16-648

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 111.

JOHN J. FITZPATRICK, SURVIVING PARTNER OF FITZPATRICK BROTHERS, PLAINTIFF IN ERROR,

vs.

CHARLES M. FLANNAGAN AND GEORGE M. FLANNAGAN, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF C. M. & G. M. FLANNAGAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED OCTOBER 20, 1879.

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1 UNITED STATES OF AMERICA,
Southern District of Mississippi:

Pleas and proceedings had and done at a regular term of the circuit court of the United States for the southern district of Mississippi, at a regular term thereof, begun and held pursuant to law, at the court room of said court, in the city of Jackson, in said district, on the first Monday, being the 5th day, of May, in the year of our Lord one thousand eight hundred and seventy-nine. Present and presiding the honorable R. A. Hill, U. S. district judge for Mississippi. Present also, Thos. W. Hunt, marshal for said district, and James M. McKee, clerk of said court.

2 C. M. & G. M. FLANAGAN
v.
JOHN J. FITZPATRICK. } No. 2635.

Be it remembered that heretofore, to wit, on the 5th day of February, A. D. 1879, the plaintiffs filed in the office of the clerk of the circuit court of the United States for the southern district of Mississippi their affidavit for attachment, with garnishment, in the words and figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi.

This day personally appeared before me, clerk of said court, George M. Flanagan, who made oath that he is a member of the firm of C. M. & G. M. Flanagan, composed of himself and Charles M. Flanagan; that both members of said firm are citizens of the State of Missouri, residing in the city of St. Louis; that John J. Fitzpatrick, a citizen of the State of Mississippi, residing in the southern district thereof, is the surviving
3 partner of the late firm of Fitzpatrick Bros., composed of the said John and James C. Fitzpatrick, deceased, which said deceased was in his life-time a citizen of the State of Mississippi, residing in the southern district thereof; that as surviving partner of said firm of Fitzpatrick Bros., the said John is the legal owner of all the property of every sort whatever belonging to said late firm; that as such surviving partner the said John J. Fitzpatrick is justly indebted to said firm of C. M. & G. M. Flanagan in the sum of $6,000.00, which was a debt contracted by said James C. Fitzpatrick and Eugene A. Forbes, then partners under the firm name of Forbes & Fitzpatrick, and was evidenced by note of said Forbes & Fitzpatrick, dated Dec. 22, 1877, due twelve months after date, which said debt was afterwards, on the dissolution of the firm of Forbes & Fitzpatrick and the creation of the
4 *creation of the* firm of Fitzpatrick & Bros., for a valid consideration, assumed by said Fitzpatrick Bros., and in the further sum of $2,000.00 by note of Fitzpatrick Bros., dated April 12, 1878, due Nov. 20, 1878; and in the further sum of $1,500.00 by note dated Ap'l 12, 1878, due Nov. 1, 1878; and in the further sum of $500 by acceptance dated June 12, 1878, due Aug. 17, 1878; and in the further sum of $500.00 by acceptance June 12, 1878, due Sept. 1st, 1878; and in the further sum of $500 by acceptance dated June 12, 1878, due Sept. 16, 1878; and in the further sum of $500.00 by acceptance June 12, 1878, due Oct. 1st, 1878; and in the further sum of $205.00, acceptance dated June 29th, 1878, due 60 days after date; and in the further sum of $234.64 by acceptance dated July

13, 1878, due 60 days after date; and in the further sum of $232.39 by acceptance dated July 18, 1878, due 45 days after date;
5 and in the further sum of $204.26 dated July 18, 1878, due 60 days after date; and in the further sum of $201.68 by acceptance, dated July 20th, 1878, payable 30 days after date; and in the further sum of $115.00 by acceptance July 22, 1878, due 30 days after date; and in the further sum of $300.00, acceptance dated July 22, 1878, due Aug. 20, 1878; and in the further sum of $256.81, acceptance July 27, 1878, due 30 days after date; and in the further sum of $250.00, acceptance July 27, '78, due at 60 days after date; and in the further sum of $119.02, acceptance July 29, '78, at 30 days; and in the further sum of $110.00, acceptance dated July 30, 1878, due at 30 days after date; and in the further sum of $348.33, acceptance dated Aug. 1, '78, due 60 days after date; and in the further sum of $116.00, acceptance dated Aug. 3, '78, due 60 days after date; and in the further sum of
6 $325.06, acceptance dated Aug. 8, '78, at 60 days; and in the further sum of $138.56, acceptance Aug. 9, 1878, 30 days; and in the further sum of $537.33, acceptance dated Aug. 10, 1878, 60 days after date; and in the further sum of $343.90, acceptance Aug. 13, 1878, 60 days after date; and in the further sum of $379.55, acceptance dated Aug. 15, 1878, due 60 days after date; that all of said evidences of debt were executed during the lifetime of said James C. Fitzpatrick and during the existence of said firm, and in the sum of $6.20, protest fees on certain of said acceptances, and in the further sum of $12.82, on open account for cash advanced said Fitzpatrick Bros., the whole of said indebtedness aggregating the sum of $15,936.55, and that the said John J. Fitzpatrick has property or rights in action which he conceals and unjustly refuses to apply to the payments of his debts, and that he has assigned or disposed of, or is about to assign or dis-
7 pose of, his property or rights in action, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them; and that he has converted or is about to convert his property into money or evidence of debt with intent to place it beyond the reach of his creditors.

Wherefore he prays an attachment against said Fitzpatrick.

And affiant now suggests that John McGinty, Edward McGinty, and George M. Klein, cashier of the Mississippi Valley Bank, are indebted to the defendant, or have property of his in their hands, or know of some other person so indebted, or who has effects or property of defendant in his hands, and asks that they may be summoned as garnishes herein.

G. M. FLANAGAN.

Sworn to and subscribed before me this 5th day of Feb'y, A. D. 1879.

JAS. M. McKEE,
Clk U. S. Cir. Court So Dist. of Miss.

8 And on the 5th day of February, A. D. 1879, the plaintiffs filed herein their attachment bond in the words and figures following, to wit:

Know all men by these presents that we, Charles M. Flanagan and George M. Flanagan, as principals, and Sherman H. Parisat, Leonidas A. Campbell, and D. W. Lamkin, as sureties, are justly indebted to John J. Fitzpatrick, his heirs, executors, and administrators, in the sum of $31,873.10, for the payment of which, well and truly to be made, we hereby, jointly and severally, firmly bind ourselves, our heirs, executors,

and administrators. Signed with our hands and sealed with our seals this 5th day of February, A. D. 1879.

The condition of the above obligation is such that whereas the above bound Charles M. & George M. Flanagan have, on the day of the date
9 hereof, prayed an attachment at the suit of themselves against the estate of the above-named John J. Fitzpatrick for the sum of $15,936.55, and have obtained the same returnable to circuit court of the United States for the southern district of Mississippi, to be held at Jackson, on the 5th day of May, 1879:

Now, if the said plaintiffs in the said attachment shall well and truly pay and satisfy to the said defendant all such damages as he shall sustain by reason of the wrongful sueing out of said attachment, and shall also pay all costs which may be awarded against the said plaintiffs in said suit, then the above obligation to be void, otherwise to remain in full force and effect.

CHAS. M. FLANAGAN, [SEAL.]
By T. C. CATCHINGS, *Ag't.*
GEO. M. FLANAGAN, [SEAL.]
LEONIDAS N. CAMPBELL, [SEAL.]
By T. C. CATCHINGS, *Ag't.*
SHERMAN H. PARISAT, [SEAL.]
By T. C. CATCHINGS, *Ag't.*
D. W. LAMKIN, [SEAL.]
By T. C. CATCHINGS, *Ag't.*

I approve the foregoing bond.

J. M. McKEE, *Clerk.*

10 And on the 5th day of February, A. D. 1878, a writ of attachment was issued herein, which, with the return of marshal thereon, is in words and figures following, to wit:

The United States of America to the marshal of the southern district of Mississippi, greeting:

Whereas, C. M. & G. M. Flanagan have this day complained by affidavit before me, the clerk of the circuit court of the United States for the southern district of Mississippi, that John J. Fitzpatrick is justly indebted to them in the sum of $15,936.55, exclusive of interest, or thereabouts, and oath having been also made before me that the said John J. Fitzpatrick has property or rights in action which he conceals and unjustly refuses to apply to the payment of his debts, and that he has assigned or disposed of or is about to assign or dispose of his
11 property or rights in action or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them, and that he has converted or is about to convert his property into money or evidences of debt, with intent to place it beyond the reach of his creditors, and bond with security having been given to me pursuant to the statute, you are therefore hereby commanded to forthwith attach the estate, real and personal, of the aforesaid John J. Fitzpatrick, in your district, to the full value of said demand, and the probable cost of this proceeding, and that you safely keep the property so attached or levied upon in your hands, unless replevied according to law, so as to compel the aforesaid John J. Fitzpatrick to appear before the circuit court of the United States for the southern district of Mississippi, to be held at Jackson on May 5th, 1879, to an-
12 swer unto the complaint of the aforesaid C. M. & G. M. Flana-

gan, and that you summons the said defendant, if to be found in your district, to be and personally appear at the court aforesaid on the day above named, then and there to answer accordingly.

You are also commanded to summons Edward McGinty and John McGinty and George M. Klein, cashier Miss. Valley Bank, to answer severally herein at the time and place aforesaid, as garnishees, on oath, what he is indebted or was indebted to the defendant at the time of the service this attachment, and what effects of the defendant he has or at the time of said service he had in his hands, and what effects or debts of the defendant there are in the hands of any other person to his knowledge or belief.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States.

13 Witness also the signature of the clerk of the circuit court of the United States for the southern district of Mississippi, and the seal of said court this 5th Feb'y, A. D. 1879.

[SEAL.] JAS. M. McKEE, *Clerk.*

Marshal's return.

By virtue and in pursuance of the within writ of attachment and garnishment, I did, on the 7th day of February, 1879, at half past twelve o'clock, levy and take in my possession, as the property of the defendant herein, a certain lot of goods, wares, and merchandise, and other things, as appears by the inventory of the same hereunto attached as Exhibit A, and made a part of this return, which said goods I found in possession of said Jno. J. Fitzpatrick, and valued each article as shown by said inventory, aggregating the sum of $7,273.72. And afterwards, to

14 wit, on February 14, 1879, Edward McGinty made claim that he was the owner of said property in said inventory (except about thirty bbls. old flour, branded Clyde, Olive, Glenwood, and St. James), and filed with me his affidavit of ownership, and thereupon the plaintiff and defendant herein, and said claimant and their attorneys, agreed among themselves to value said property so claimed by said Edward McGinty at $5,600.00, and said Edward McGinty tendered me a claimant's bond in double said agreed valuation with Jno. McGinty, J. H. Klein, and Patrick J. Kennedy as sureties; which affidavit of said claim and said bond I accepted, and turned said goods over to said Edward McGinty, and herewith return said affidavit and bond; and I also summoned the said defendant Jno. J. Fitzpatrick personally to appear and answer this writ, and delivered him a true copy of the same on the 7th day of February, 1879; also, on the 7th day of Feb-

15 ruary, 1879, I summoned Geo. M. Klein, cashier of the Mississippi Valley Bank, and John McGinty, personally to appear and answer this writ as garnishees, and delivered each of them a true copy of the same; also, on the 12th of Feb'y, 1879, I summoned Edward McGinty personally to appear and answer this writ, as garnishee, and delivered him a true copy of the same.

THOS. W. HUNT,
U. S. Marshal,
By JNO. D. TINNEY,
Deputy U. S. Marshal.

And on the 5th day of May, A. D. 1879, plaintiffs filed their declaration herein, with twenty-five exhibits thereto, in the words and figures ollowing, to wit:

UNITED STATES OF AMERICA,
Southern Dist. of Miss.:

In the circuit court of the United States for the southern dis-
16 trict of Mississippi. To the May term, 1879.

Chas. M. Flanagan and George M. Flanagan, partners doing business under the firm name of C. M. & G. M. Flanagan, citizens of the State of Missouri, plaintiffs, complain of John J. Fitzpatrick, citizen of the State of Mississippi, and residing in the southern district thereof, defendant, who has heretofore been attached and allege, in assumpsit:

That at the time of the making of the several notes, acceptances, accounts, and debts hereinafter particularly mentioned the defendant and one James C. Fitzpatrick were partners doing business under the firm name of Fitzpatrick Bros., the said James C. being at that time likewise a citizen of the State of Mississippi, and residing in the southern dist. thereof. That on the 29th June, 1878, at St. Louis, the plaintiffs by their bill of exchange required the said Fitzpatrick Bros., sixty days
17 after date, for value rec'd, to pay to their order two hundred and five dollars, which bill was duly accepted.

Also that at St. Louis on July 13, 1878, the plaintiffs by their bill of exchange required the said Fitzpatrick Bros. to pay to their order, sixty days after date, for value rec'd, two hundred and thirty-four & $\frac{64}{100}$ doll's, which bill was duly accepted.

Also that at St. Louis on July 18, 1878, the plaintiffs by their bill of exchange required the said Fitzpatrick Bros. to pay to their order, forty-five days after date, for value rec'd, two hundred and thirty two & $\frac{39}{100}$ dollars, which bill was duly accepted.

Also that at St. Louis July 18, 1878, the plaintiffs by their bill of exchanged required the said Fitzpatrick Bros. to pay to their order two hundred and four & $\frac{26}{100}$ dollars, for value rec'd, sixty days after date, which bill was duly accepted.

Also that at St. Louis July 20, 1878, the plaintiffs by their bill
18 of exchange required the said Fitzpatrick Bros. to pay to their thirty days after , for value rec'd, two hundred and one dollars, which bill was duly accepted.

Also, that at St. Louis, July 22, 1878, the plaintiffs, by their bill of exchange, required the said Fitzpatrick Bros. to pay to their own order, thirty days after date, for value rec'd, one hundred and fifteen dollars, which bill was duly accepted.

Also, that at St. Louis, July 22, 1878, the plaintiffs, by their bill of exchange, required the said Fitzpatrick Bros., for value, on Aug. 20th, 1878, to pay to their own order three hundred dollars, which bill was duly accepted.

Also, that at St. Louis, July 27, 1878, the plaintiffs, by their bill of exchange, required the said Fitzpatrick Bros., for value rec'd, to pay to their own order, thirty days after date, two hundred and fifty-six & $\frac{81}{100}$ dollars, which bill was duly accepted.

19 Also, that at St. Louis, July 27, 1878, the plaintiffs, by their bill of exchange, requ'red the said Fitzpatrick Bros. to pay to their own order, sixty days after date, for value rec'd, two hundred and fifty dollars, which bill was duly accepted.

Also, that at St. Louis, July 29, 1878, the plaintiffs, by their bill of exchange, required said Fitzpatrick Bros. to pay to their own order, thirty days after date, one hundred and nineteen & $\frac{02}{100}$ doll's, for value rec'd, which bill was duly accepted.

Also, that at St. Louis, July 30, 1878, the plaintiffs, by their bill of

exchange, required said Fitzpatrick Bros., thirty days after date, to pay, for value rec'd, to their own order, one hundred and ten dollars, which bill was duly accepted.

Also, that at St. Louis, Aug. 1st, 1878, the plaintiffs, by their bill of exchange, required the said Fitzpatrick Bros., for value rec'd,
20 to pay to their own order, sixty days after date, three hundred and forty-eight & $\frac{33}{100}$ doll's, which bill was duly accepted.

Also, that at St. Louis, August 3rd, 1878, the plaintiffs, by their bill of exchange, required said Fitzpatrick Bros. to pay to their own order, for value rec'd, sixty days after date, one hundred and sixteen doll's, which bill was duly accepted.

Also, that at St. Louis, August 1st, 1878, the plaintiffs, by their bill of exchange, required said Fitzpatrick Bro's to pay to their own order, sixty days after date, for value rec'd, three hundred and twenty-five & $\frac{06}{100}$ doll's, which bill was duly accepted.

Also, that at St. Louis, August 9th, 1878, the plaintiff, by their bill of exchange, required said Fitzpatrick Bros. to pay to their own order, thirty days after date, for value rec'd, one hundred and thirty-eight & $\frac{56}{100}$ doll's, which bill was duly accepted.

21 Also, that at St. Louis, August 10, 1878, the plaintiffs, by their bill of exchange, required said Fitzpatrick Bros. to pay to their order, for value rec'd, sixty days after date, five hundred and thirty-seven & $\frac{33}{100}$ doll's, which bill was duly accepted.

Also, that at St. Louis, August 13, 1878, the plaintiffs, by their bill of exchange, required the said Fitzpatrick Bros. to pay to their order, sixty days after date, for value rec'd, three hundred and forty-three & $\frac{90}{100}$ doll's, which bill was duly accepted.

Also, that at St. Louis, August 15th, 1878, the plaintiffs, by their bill of exchange, required said Fitzpatrick Bros. to pay to their own order, value rec'd, sixty days after date, three hundred and seventy-nine & $\frac{55}{100}$ doll's, which bill was duly accepted.

Also, that at St. Louis, June 12, 1878, the plaintiffs, by their
22 bill of exchange, required said Fitzpatrick Bros. to pay to their order, value rec'd, on August 17th, 1878, five hundred doll's, which bill was duly accepted.

Also, that at St. Louis, June 12, 1878, the plaintiffs, by their bill of exchange, required said Fitzpatrick Bros. to pay to their order, Sept. 1st, 1878, for value rec'd, five hundred doll's, which bill was duly accepted.

Also, that at St. Louis, June 12, 1878, the plaintiffs, by their bill of exchange, required said Fitzpatrick Bros. to pay to their own order, Sept. 16th, 1878, five hundred dollars, for value rec'd, which bill was duly accepted.

Also, that at St. Louis, June 12th, 1878, the plaintiffs, by their bill of exchange, required said Fitzpatrick Bros. to pay to their own order, Oct. 1, 1878, for value rec'd, five hundred dollars, which bill was duly accepted.

Also, that at St. Louis, April 12th, 1878, the said Fitzpatrick
23 Bros., by their promissory note, promised to pay plaintiffs, Nov. 20, 1878, for value rec'd, two thousand dollars.

Also, that at St. Louis, Apr. 12, 1878, said Fitzpatrick Bros., by their promissory notes, promised, Nov. 1, 1878, to pay to plaintiffs, for value rec'd, fifteen hundred doll's.

Plaintiffs aver that when the aforesaid several bills of exchange and promissory notes became due and payable they were duly presented for

payment, but the payment was not made of the same, or any of them, and that they each and all of them remain wholly due and unpaid.

Plaintiffs further aver that on the 22nd Dec., 1877, at Vicksburg, Miss., the firm of Forbes & Fitzpatrick, composed of Eugene A. Forbes and the aforesaid J. C. Fitzpatrick, by their promissory note, for value rec'd, promised to pay, twelve months after date, to plaintiffs, six thousand dollars, and that said firm, without having paid the same,
24 dissolved, and that the said James C. and John J. Fitzpatrick then organized the firm of Fitzpatrick Bros., who became the successors of said Forbes & Fitzpatrick, and, by the terms thereof, and in consideration that the said Eugene A. Forbes withdrew and assigned his interest in all the assets of said firm to Fitzpatrick Bros., who, by means thereof, became the owners thereof, the said Fitzpatrick Bros. undertook and promised to pay plaintiffs said of money whenever requested so to do; yet plaintiffs aver that defendants wholly disregarded their promise in this behalf, and have not paid said sum of six thousand or any part thereof.

Plaintiffs aver that, on the 19' Aug., 1878, said Fitzpatrick Bros. were indebted to them in the sum of twelve & $\frac{82}{100}$ dolls., for money advanced, laid out, and expended for the use and benefit, and at their special instance and request, and being so indebted, promised to pay plaintiffs said sum whenever requested so to do, but
25 that the same remains wholly due and unpaid.

The plaintiffs aver that, after the making the said several promises in this behalf, above stated, the said James C. Fitzpatrick died, leaving the defendant John J. Fitzpatrick the sole surviving partner of said firm.

Plaintiffs aver that, by reason of the premises, a right of action hath accrued to them against the defendant John J. Fitzpatrick for the sum of $15,890.35, being the aggregate of the several sums before mentioned, and that they are entitled to have and recover of defendant the said sum of money with interest and costs of suit, for which they sue and ask judgment.

CATCHINGS & INGERSOLL,
Pl'ffs Att'y.

26 OFFICE OF C. M. & G. M. FLANAGAN,
No. 9352.] *St. Louis, July* 22, 1878.

Thirty days after date pay to the order of ourselves one hundred and fifteen $\frac{}{100}$ dollars, for value received, with exchange on St. Louis.

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$115.00. *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

$6,000.00.] VICKSBURG, MISS., *Dec.* 22, 1877.

Twelve months after date we promise to pay to the order of C. M. & G. M. Flanagan six thousand dollars, for value received, negotiable and payable without defalcation or discount at their office in St. Louis, Mo.

FORBES & FITZPATRICK.

(Across the face:) Protested for non-payment, at St. Louis, Mo., Dec. 26th, 1878.

WM. HAMMEL, *Notary Public.*

OFFICE OF C. M. & G. M. FLANAGAN,
No. 9273.] *St. Louis, June* 29, 1878.

Sixty days after date pay to the order of ourselves two hundred and five dollars for value received, with exchange on St. Louis.

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$205.00.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

27 No. 9331.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, July 13, 1878.

Sixty days after date pay to the order of ourselves two hundred and thirty-four $\frac{64}{100}$ dollars, for value received, with exchange on St. Louis.

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$234.64.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

$232.39.] ST. LOUIS, *July* 18, 1878.

Forty-five days after date pay to the order of ourselves two hundred & thirty-two $\frac{39}{100}$ dollars, value received, and charge the same to account of

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
Vicksburg, Miss.

(Written across the face:) **Accepted:**

FITZPATRICK BROS

No. 9344.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, July 20, 1878.

Thirty days after date pay to the order of ourselves two hundred & one $\frac{68}{100}$ dollars, for value received, with exchange on St. Louis.

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$201.68.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

28 No. 9348.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, July 18, 1878.

Sixty days after date pay to the order of ourselves two hundred and four 26 dollars, for value received, with exchange on St. Louis.

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$204.26.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

No. 9350.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, July 22, 1878.

On Aug. 20th, 1878, fixed pay to the order of ourselves three hundred $\frac{}{100}$ dollars, for value received, with exchange on St. Louis.

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$300.00.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

No. 9360.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, July 27, 1878.

Thirty days after date pay to the order of ourselves two hundred and fifty-six $\frac{81}{100}$ dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$256.81.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

29 No. 9366.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, July 27, 1879.

Sixty days after date pay to the order of ourselves two hundred & fifty $\frac{}{100}$ dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$250.00.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

No. 9371.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, July 29, 1878.

Thirty days after date pay to the order of ourselves one hundred & nineteen $\frac{02}{100}$ dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$119.02.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

$110.00.] *St. Louis, July* 30, 1878.

Thirty days after date pay to the order of ourselves one hundred & ten $\frac{}{100}$ dollars, value received, and charge the same to account of—
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
Vicksburg, Miss.

(Written across the face:) Copy of acceptance lost in transit between St. Louis & Vicksburg. Same mailed to Miss. Valley Bank, V'b'g.
Accepted.
FITZPATRICK BROS.

30 No. 9381.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, August 1*st*, 1878.

Sixty days after date pay to the order of ourselves three hundred & forty-eight $\frac{33}{100}$ dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$348.33.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

No. 9385.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, August 3, 1878.

Sixty days after date pay to the order of ourselves one hundred & sixteen dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$116.00.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

No. 9404.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, August 8th, 1878.

Sixty days after date pay to the order of ourselves three hundred & twenty-five $\frac{06}{100}$ dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$325.06.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

31 No. 9409.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, Aug. 9th, 1878.

Thirty days after date pay to the order of ourselves one hundred and thirty-eight $\frac{56}{100}$ dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK, BROS.,
$138.56] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

No. 9412.] OFFICE OF C. M. &. G. M. FLANAGAN,
St. Louis, August 10, 1878.

Sixty days after date pay to the order of ourselves five hundred & thirty-seven $\frac{33}{100}$ dollars, for value received, with exchange on St. Louis.
C. M. &. G. M. FLANAGAN.

To FITZPATRICK BROS.,
$537.33.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

No. 9421.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, August 13, 1878.

Sixty days after date pay to the order of ourselves three hundred & forty-three $\frac{90}{100}$ dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$343.90.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

32 No. 9428.] OFFICE OF C. M. & G. M. FLANAGAN,
ST. LOUIS, *August* 15, 1878.

Sixty days after sight pay to the order of ourselves three hundred & seventy-nine $\frac{55}{100}$ dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$379.55.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

No. 9232.] OFFICE OF C. M. & G. M. FLANAGAN,
ST. LOUIS, *June* 12, 1878.

On Aug. 17th, 1878, fixed, pay to the order of ourselves five hundred dollars, for value received, with exchange on St. Louis.
C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$500.00.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

$500.00.] ST. LOUIS, *June* 12, 1878.

On Sept. 1st, 1878, fixed, pay to the order of ourselves five hundred dollars, value received, and charge the same to account of—

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
Vicksburg, Miss.

(Written across the face:) Copy of acceptance lost in transit between St. Louis & Vicksburg. Same mailed to the Miss. Valley B'k, V'b'g.
Accepted.

FITZPATRICK BROS.

33 No. 9235.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, June 12, 1878.

On Oct. 1st, 1878, fixed, pay to the order of ourselves five hundred dollars, for value received, with exchange on St. Louis.

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$500.00.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

No. 9234.] OFFICE OF C. M. & G. M. FLANAGAN,
St. Louis, June 12, 1878.

On Sept. 16th, 1878, fixed, pay to the order of ourselves five hundred $\frac{}{100}$ dollars, for value received, with exchange on St. Louis.

C. M. & G. M. FLANAGAN.

To FITZPATRICK BROS.,
$500.00.] *Vicksburg, Miss.*

(Across the face:) FITZPATRICK BROS.

$2,000.00.] ST. LOUIS, *April 12th*, 1878.

On twentieth November fixed after date we promise to pay to the order of C. M. & G. M. Flanagan two thousand dollars, for value received, negotiable and payable, without defalcation or discount, at our office, Vicksburg, Miss., with exchange on St. Louis or New York.

FITZPATRICK BROS.

34 1,500.00.] ST. LOUIS, *April 12th*, 1878.

On first November fixed after date we promise to pay to the order of C. M. & G. M. Flanagan fifteen hundred dollars, for value received, negotiable and payable, without defalcation or discount, at our office, Vicksburg, Miss., with exchange on St. Louis or N. York.

FITZPATRICK BROS.

And on the 16th day of May, A. D. 1879, the following order was made in said cause and entered upon the minutes of said court in the words & figures following, to wit:

35 *Ord. for spa. d. t. May* 16, '79.

C. M. & G. M. FLANAGAN
v.
JNO. J. FITZPATRICK.

On motion of counsel for plff's' it is ordered that a subpœna duces

tecum issue for Jno. J. Fitzpatrick, a witness for plaintiffs, commanding him to bring with him into court the ledger, journal, cash-book, and petty cash and letter book of the late firm of Fitzpatrick Bros.; also all letters received by Fitzpatrick Bros. and Jno. J. Fitzpatrick from John McGinty, Edward McGinty, and P. J. Kennedy; also articles of copartnership or agreement between John J. Fitzpatrick and Edward McGuity, under which the business of Fitzpatrick & McGinty is now conducted; also the bank book or books of Fitzpatrick Bros., John J. Fitzpatrick, and Fitzpatrick & McGinty; also the bills payable book of Fitzpatrick Bros. and Fitzpatrick & McGinty.

36 Also that subpœna duces tecum be also issued for Edward McGinty, commanding him to bring with him into court the ledger, journal, cash-book, and petty cash and letter book of Fitzpatrick & McGinty; also the bank-books of Fitzpatrick & McGinty and Edward McGinty; also the bills payable book of Fitzpatrick & McGinty; also articles of copartnership or agreement between Edward McGinty and Jno. J. Fitzpatrick, under which the business of Fitzpatrick & McGinty is now conducted; also all letters received by Edward McGinty and Fitzpatrick & McGinty, at any time, from John McGinty or P. J. Kennedy or Jno. J. Fitzpatrick.

And on the 19th day of May, A. D. 1878, the following order setting said cause for hearing was made in said cause, and entered upon the minutes in the words & figures following, to wit:

37 C. M. & G. M. FLANNAGAN
vs.
JNO. J. FITZPATRICK.

Ordered that this cause be set for trial on Friday of this week.

And on the 23rd day of May, A. D. 1878, the defendant filed his plea in abatement in the words & figures following, to wit:

38 C. M. & G. M. FLANNAGAN
vs.
JNO. J. FITZPATRICK, SURVIVING PARTNER, &c.

Personally appeared before the undersigned, John J. Fitzpatrick, who, being duly sworn, says that at the time of the suing out of the attachment herein he did not have property or rights in action which he concealed and unjustly refused to apply to the payment of his debts, and that he had not assigned or disposed of, and was not about to assign or dispose of, his property or rights in action or some part thereof, with intent, to defraud his creditors, or give an unfair preference to some of them, and that he had not converted and was not about to convert his property into money or evidence of debt with intent to place it beyond the reach of his creditors.

J. J. FITZPATRICK.

Subscribed & sworn to before me this 13 , 1879.
J. M. McKEE, *Clk.*

39 And on the 23rd day of May, A. D. 1879, the following order was made in said cause and entered on the minutes of said court, in the words & figures following, to wit:

C. M. & G. M. FLANNAGAN
vs.
JNO. J. FITZPATRICK.

On motion of plaintiffs, it is ordered that plaintiffs have leave to amend their affidavit herein.

And on the 23d day of May, A. D. 1879, the plaintiffs filed their amended affidavit herein in the words & figures following, to wit:

40 C. M. & G. M. FLANNAGAN
vs.
JNO. J. FITZPATRICK, SURVIVING PARTNER.

This day personally appeared before me, by way of amendment of his affidavit for attachment, and by leave of the court first had and obtained for that purpose, and being duly sworn, did depose and say: That the firm of Fitzpatrick Bros., composed of defendant and James C. Fitzpatrick, deceased, and of which he is the surviving partner, fraudulently contracted the debt, or incurred the obligation for which suit has been or is about to be brought.

G. M. FLANNAGAN

Sworn to and subscribed before me this 23rd day of May, 1879.
JAMES M. McKEE, *Clerk.*

41 And on the 23 day of May, A. D. 1879, the defendant filed his plea to the amended affidavit of the plaintiff in the words & figures following, to wit:

C. M. & G. M. FLANNAGAN
vs.
JNO. J. FITZPATRICK.

And defendant, for plea to the new cause of attachment inserted in plaintiffs' affidavit by amendment allowed by the court, says that it is not true that he fraudulently contracted the debt or incurred the obligation for which suit has been brought.

J. J. FITZPATRICK.

Subscribed & sworn to this 23rd May, 1879.
J. M. McKEE, *Clerk.*

And on the 23rd of May, A. D. 1879, the following proceedings were had in said cause entered of record, in the words & figures following, to wit:

42 C. M. & G. M. FLANAGAN
v.
JNO. J. FITZPATRICK.

This day came the parties by their attorneys, and issue being joined upon the pleas in abatement filed by defendant herein, traversing the truth of the alleged causes for which the attachment herein was sued out, it is ordered that a jury come, whereupon came a jury of good and lawful men as follows, to wit, H. S. King, S. R. Lamkin, J. J. Veazie, A. F. Kelly, W. D. Larkin, C. H. Forman, Thos. R. Quarterman, G.

Henderson, P. S. Price, F. A. Wolfe, Henry Bailey, and W. H. Batte, who being duly elected, empanneled, and sworn, and a part of the evidence submitted to them, were allowed, under the orders of the court, to disperse until to-morrow 9 o'clock a. m.

And on the 24th day of May the following proceedings were had and entered of record on the minutes of the court in the words and figures following, to wit:

43 C. M. & G. M. FLANAGAN
v.
JNO. J. FITZPATRICK.

This day came again the parties by their attorney, came again also the jury empanneled in this cause on yesterday, to wit, H. S. King, S. R. Lamkin, J. J. Veazie, W. D. Larkin, C. H. Forman, Thos. R. Quarterman, G. Henderson, P. S. Price, Henry Bailey, W. H. Batte, and F. A. Wolfe, and, after further testimony being submitted to them, were permitted, under the orders of the court, to disperse until Monday next nine o'clock a. m.

And on the 26th day of May, A. D. 1879, the following proceedings were had in said cause and entered on the minutes of *of* the court in the words and figures following, to wit:

C. M. & G. M. FLANAGAN
v.
JNO. J. FITZPATRICK. 2635.

44 This day came again the parties by their attorneys, came again also the jury heretofore empanneled in this cause, to wit, H. S. King, S. R. Lamkin, J. J. Veazie, A. F. Kelly, W. D. Larkin, C. Forman, Thos. R. Quarterman, G. Henderson, P. S. Price, Henry Bailey, W. H. Batte, and F. A. Wolfe, and the evidence being all submitted to the jury, and, being charged by the court, said jury returned into court the following verdict upon their oaths, viz: We, the jury, do find that the attachment herein was rightfully sued out. It is thereupon considered by the court that the defendant have leave to plead forthwith to the merits, which is accordingly done.

And on the 28th day of May, A. D. 1879, the defendants filed their demurrer to plaintiff' declaration in said cause in the words & figures following, to wit:

45 *Demurrer of defendant to declaration.*

In the circuit court of the United States for the southern district of Miss.

C. M. & G. M. FLANNAGAN, PL'FF',
vs.
J. J. FITZPATRICK, SURVIVING PARTNER OF Fitzpatrick Bros.

And the said defendant, by his attorney, comes and defends the wrong and injury, when, &c., and says that the said declaration and the matters therein contained in manner and form, as the same are above stated and set forth, are not sufficient in law for the said plaint-

iffs to have or maintain their aforesaid action thereof against the said defendant, and he, the said defendant, is not bound by law to answer the same, and this he is ready to verify. Wherefore, by reason of the insufficiency of the said declaration in this behalf, the said defend-
46 ant prays judgment, & that the said plaintiff may be barred from having or maintaining their aforesaid action thereof against them.

And the said defendant shows to the court here the following causes of demurrer to the said declaration; that is to say—

For that said declaration sets forth in one and the same count several separate and distinct causes of action based upon several separate and distinct alleged considerations, and also that the said declaration is in other respects uncertain, informal, & insufficient.

PITTMAN & PITTMAN,
Attorneys for Defendant.

And on the 28th day of May, A. D. 1879, the following proceedings were had in said cause, & entered of record on the minutes of said court in the words & figures following, to wit:

47 C. M. & G. M. FLANNAGAN
vs.
JNO. J. FITZPATRICK.

This day came on to be heard the demurrer *to* the defendant to plaintiffs' declaration, and the court being sufficiently advised thereof, doth order and adjudge that said demurrer be, and the same is hereby, overruled.

And on the 28th day of May, A. D. 1879, the defendant filed his five pleas to the plaintiffs' declaration in said cause in the words & figures following, to wit:

48 In the circuit court of the United States for the southern district of Mississippi.

C. M. & G. M. FLANAGAN, PL'FFS,
v.
JOHN J. FITZPATRICK, DEF'T.

1. And the said defendant comes, by his attorney, and defends the wrong and injury, when, &c., and saith that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.

PITTMAN & PITTMAN,
Attorneys for Def't.

And pl'ffs doth the like.

CATCHINGS & INGERSOLL & NUGENT,
For Pl'ffs.

2. And for a further plea in this behalf the said defendant, by leave of court here obtained, says that the said plaintiffs ought not to
49 have or maintain their aforesaid action thereof against him as to so much thereof & as to such part of said several causes of action therein stated as is claimed and founded on the averment that on the 22nd day of December, 1877, at Vicksburg, Miss., the firm of

Forbes & Fitzpatrick, alleged therein to have been composed of Eugene A. Forbes & Jamee C. Fitzpatrick, by their promissory note, for value received, promised to pay, twelve months after date, to plaintiffs, six thousand dollars, and that said firm, without having paid the same, dissolved; & that the said James C. Fitzpatrick and John J. Fitzpatrick then organized the firm of Fitzpatrick Bros., who became the successors of said Forbes & Fitzpatrick, & by the terms thereof & in consideration that the said Eugene A. Forbes withdrew and assigned his interest in all the assets of said firm to Fitzpatrick Bros.,
50 who, by means thereof, became the owners thereof; the said Fitzpatrick Bros. undertook and promised to pay plaintiffs said sum of money whenever requested so to do, because, he says, said supposed promise was a special promise to answer for the debt of another person within the meaning of the statute in such case made & provided, & that said supposed promise or agreement, upon which plaintiffs have declared was not in writing, nor is there any memorandum or note thereof in writing, signed by this defendant, or by any other person by him thereunto authorized, and of this he puts himself upon the country.

PITTMAN & PITTMAN,
Attorneys for Def't.

3. And for a further plea in this behalf, said defendant says that said plaintiffs ought not to have or maintain their aforesaid action
51 thereof against said defendant as to so much thereof as is founded on the alleged promise of defendant to pay the promissory note of Forbes & Fitzpatrick, as stated in defendant's plea last above pleaded, because, he saith, that said supposed promise was without any consideration good or valuable in law, and of this he puts himself upon the country.

PITTMAN & PITTMAN,
Att'ys for Def't.

And pl'ffs do the like.

CATCHINGS & INGERSOLL & NUGENT,
For Pl'ffs.

4. And for a further plea in this behalf, as to the cause of action claimed and founded on the alleged promise of defendant to pay the said promissory note of Forbes & Fitzpatrick, said defendant saith that the consideration of the said supposed promise so declared on was a sale by the said Eugene A. Forbes of his interest as a partner
52 of the said firm of Forbes & Fitzpatrick in the property and assets of said firm to defendant, which said sale was made by the said Forbes, with the representation that the value of the assets of said firm largely exceeds the liabilities thereof, which this defendant, together with James C. Fitzpatrick, as his partner, assumed to pay, & that the interest of said Forbes in said property and assets was of the value of ten thousand dollars, and that this defendant relied on the representations aforesaid in making said purchase, and was deceived thereby, and said defendant avers the truth to be that in fact the liabilities so assumed by defendant as partner of the firm of Fitzpatrick Bros. largely exceeded the value of the entire property and assets of the late firm of Forbes & Fitzpatrick, so that in fact the interest of said Forbes therein was not of any value whatever, and this he is ready to verify.

PITTMAN & PITTMAN,
Att'ys for Def't.

53 5. And for a further plea in this behalf, the said defendant says that the plaintiffs ought not to have or maintain their aforesaid action thereof against them as to so much thereof as is founded on said several bills of exchange and promissory notes in said declaration mentioned, because, he saith, that the same were without any consideration good or valuable in law, and this he is ready to verify.

PITTMAN & PITTMAN,
Att'ys for Def't.

And on the 28th day of May, A. D. 1879, the plaintiffs filed the following demurrer and replication in said cause in the words & figures following, to wit:

54 C. M. & G. M. FLANNAGAN
vs.
JOHN J. FITZPATRICK.

1. And the said plaintiff, as to the second plea by defendant above pleaded, says that the same is not good and sufficient; whereupon plaintiffs do demur to the said plea, and pray the judgment of this court whether any other or further answer they ought to make thereto. And for causes of demurrer pl'ff assign the following:

1. Said plea is informal, insufficient, and inapplicable to this action.
2. The contract was not within the operation of the statute of frauds.
3. And for other causes to be assigned at the hearing.

2nd. And for replication to defendant's fourth plea above pleaded, plaintiffs say that the matters and things therein and thereby
55 set forth & alleged are not true; and of this they put themselves upon the country; and defendant doth the like.

3. And for further replication to the said fourth plea of defendant, by leave of court first had and obtained, according to the statute, plaintiffs say that the said defendant, after he became fully acquainted with all the facts connected with the purchase of the interest of said Forbes in the property & assets of Forbes & Fitzpatrick, deliberately, in connection with his brother, James C. Fitzpatrick, who, with him, composed the firm of Fitzpatrick Brothers, recognized and ratified said purchase, and deliberately, with the said J. C. Fitzpatrick, now deceased, undertook & promised, as part of the consideration of said sale & purchase, to pay to pl'ff the promissory note of Forbes & Fitzpatrick for $6.000 held by pl'ff. And this pl'ffs pray may be i-
56 quired of by the country; and defendant doth the like.

4th. And as to the fifth plea of defendant above pleaded, pl'ffs say that the matter & things therein stated are not true; and this pl'ff pray may be inquired of by the country; and defendant doth the like.

CATCHINGS & INGERSOLL & NUGENT,
For Pl'ffs.

And on the 28th day of May, A. D. 1879, the following proceedings were had in said cause, & entered of record on the minutes of said court in the words & figures following, to wit:

57 C. M. & G. M. FLANAGAN
v.
JNO. J. FITZPATRICK. 2635.

This day came on to be heard the demurrer of plaintiffs to defend-

ant's second plea, and the court thereof being sufficiently advised, doth consider and order that said demurrer be, and the same is hereby, sustained, and the defendant answer over; which he declined to do.

And on the 28th day of May, A. D. 1879, the following proceedings were had in said cause, and entered upon the minutes of the court in the words and figures following, to wit:

C. M. & G. M. FLANAGAN
v.
JNO. J. FITZPATRICK. } 2635.

This day came the parties, by their attorneys, and the issue herein joined on the plea in abatement filed by defendant having been
58 at a former day of this term submitted to a jury, and the said jury having found that the attachment herein was rightfully sued out, and the defendant having then joined issue on the question of the indebtedness, it is ordered that a jury come; whereupon came a jury of good and lawful men as follows, to wit: H. S. King, S. R. Lamkin, J. J. Veazie, A. F. Kelly, W. D. Larkin, C. H. Foreman, Isham R. Dobbins, R. C. Lee, Thos. R. Quarterman, G. Henderson, P. S. Price, and Austin Neely, who, being duly elected, empannelled, sworn, and charged well and truly to try the issue joined, upon their oaths say, "We, the jury, find for the plaintiffs, and assess their damages at the sum of sixteen thousand four hundred and fifty-three & $\frac{61}{100}$ ($16,453.61) dollars.

It is thereupon considered by the court, and so ordered and adjudged, that the plaintiffs do have and recover of and from the defend-
59 ant the damages aforesaid, as by the said jurors in their verdict assessed, with interest thereon from this date until paid, at the rate of six per centum per annum, and also the costs of this cause, to be taxed.

MEMORANDUM.—Before the jury retired from the bar of the court, the defendant tendered his 3 bills of exception, which were by the court allowed and signed, and are in the words and figures following, to wit:

60 In circuit c't U. S. for so. dist. of Miss.

C. M. & G. M. FLANNAGAN
vs.
J. J. FITZPATRICK. }

Bill of exceptions by defendant, No. 1.

Be it remembered that this case coming on for trial before a jury on the 23rd day of May, 1879, on issue joined on the defendant's plea in abatement of the writ of attachment, the plaintiff moved for leave to amend his affidavit on which said writ of attachment was predicated, by adding thereto as an additional ground of attachment the words: "That the firm of Fitzpatrick Bros., composed of defendant & James C. Fitzpatrick, deceased, & of which he is the surviving partner, fraudulently contracted the debts or incurred the obligation for which suit has been or is about to be brought."

61 This motion was granted by the court against the objection of the defendant & the affidavit amended accordingly, to which said

defendant then and there excepted and prayed that this his first bill of exceptions be signed, which is accordingly now done in open court during the trial of said case, as witness the hand and seal of the presiding judge.

R. A. HILL, [L. S.]
Judge, &c.

62 In the circuit court of the United States, southern district of Mississippi.

C. M. AND G. M. FLANNAGAN
vs.
JOHN J. FITZPATRICK.

Bill of exceptions, No. 2.

Be it remembered that this cause being on trial before a jury on this 23 day of May, A. D. 1879, on the issues joined on the defendant's plea in abatement of the writ of attachment denying the grounds thereof, the following further proceedings were had:

The plaintiff had introduced evidence tending to show the following:

That in March, 1878, defendant had purchased the interest of Eugene A. Forbes in the firm of Forbes & Fitzpatrick, composed of said Forbes and one J. C. Fitzpatrick, on such terms that the said J. J. and J. C. Fitzpatrick, under firm name of Fitzpatrick & Bro., and as suc-
63 cessors of Forbes & Fitzpatrick assumed the debts of Forbes & Fitzpatrick. That among these debts were sundry sums due to the plaintiffs, then amounting to about $15,400, and other large sums to other creditors.

That the said James C. Fitzpatrick died on September 7, 1878, leaving in the hands of defendant, J. J. Fitzpatrick, as surviving partner, the stock in trade and accounts & other assets of the late firm, being wholesale grocers, and at that time entirely insolvent.

That at the time defendant bought out the interest of E. A. Forbes, and the new firm assumed all the debts of Forbes & Fitzpatrick, the debts so assumed exceeded, as was afterwards ascertained, the value of the firm's assets and property.

That after the death of J. C. Fitzpatrick, the defendant continued the old business, sold the stock on hand in part, purchased other
64 goods to replenish the said stock to upwards of twelve thousand dollars, partly on a credit & partly for cash, putting the goods indiscriminately in stock with those on hand.

That during the existence of the partnership, Fitzpatrick & Bros. had paid part of the debt assumed to plaintiffs, and had contracted other indebtedness with them for goods & money loaned, so that their indebtedness to plaintiffs remained about the same or nearly $15,000.

That the deceased partner had before his death drawn out of the partnership more than his interest therein, & was indebted to the firm. That on the 3rd of Dec., 1878, the defendant, John J. Fitzpatrick, being sorely pressed to pay some maturing bills of the firm to the Miss. Valley Bank, being debts created by the firm of Fitzpatrick Bros.,
65 borrowed $5,700 from John McGinty, of New Orleans, giving his note, signed J. J. Fitzpatrick, payable one day after date, verbally promising to repay the sum borrowed speedily out of the assets of the late firm.

That defendant devoted this money to the payment of the debts of

the late firm of Fitzpatrick & Bros., paying the same to the Miss. Valley Bank.

That Fitzpatrick & Bros. owed John McGinty also two notes, one for $2,500, and one for $5,200. That being unable to repay the money to John McGinty as promised, said defendant offered to sell out goods to him to make the payment of the whole debt due him, but said McGinty declining to purchase promised to find a purchaser for the goods & assets. That on the 19th Dec., 1878, said John McGinty returned to Vicksburg with Edward McGinty, a kinsman of the former, who
66 bought from Fitzpatrick all the stock of goods on hand, amounting to $6,633.46, as per inventory, at cost & ten per cent. added, and there was transferred to him at the same time accounts due amounting to $10,222.06. Said Edward McGinty paid $8,200 in cash, and assumed to pay obligations due in part from Fitzpatrick & Bros. & in part from Fitzpatrick, the surviving partner, for commercial debts created by him since the death of J. C. Fitzpatrick, to am't of $6,974.16.

That said Edward McGinty has paid several thousand dollars more on the debts assumed than he has collected out of the assets transferred. That the price paid by said Edward McGinty was a full and fair value for the goods and accounts.

That said Edward McGinty was himself without means and
67 had been furnished by John McGinty with the money to make these payments.

There was also evidence tending to show that Edward McGinty, Jno. McGinty, and J. J. Fitzpatrick understood that the money paid by the said Edward was to be paid by Fitzpatrick to John McGinty on the debts due to the latter.

The $8,200 was handed to Edward McGinty by J. J. Fitzpatrick to hand to John McGinty in payment of the two notes for $5,700 & $2,500 to the latter, and Edward McGinty paid the money to Jno. McGinty.

That Edward McGinty entered into contract with John J. Fitzpatrick on Dec. 20th, in the evening after the sale, by which contract Fitzpatrick was employed as a clerk to carry on the business under Edward McGinty, and for the benefit of the latter, at a salary of $2,500 per
68 annum, payable monthly. The business was conducted under the name of Fitzpatrick & McGinty. That shortly afterwards, on Dec. 24, '78, the defendant and Edward McGinty had inserted an advertisement in one of the papers to the effect that they had, on Dec. 20, '78, formed a partnership, & that the business would be conducted under the name of Fitzpatrick & McGinty, at the old stand. There was evidence tending to show that Fitzpatrick expected to be employed on same terms by McGinty, but no other evidence tending to show a promise or understanding to that effect.

There was evidence tending to show that the plaintiffs had advised defendant to sell an interest in the business to said Forbes, & form a partnership with him. It was also shown that one of the debts assumed and paid by Edward McGinty, as part of the price of his
69 purchase, was a debt or debts to the plaintiffs for goods bought by the defendant after the death of his late partner. Plaintiff testified that he did not know how these debts were paid, or were to be paid, or the terms & conditions of the alleged sale to Edward McGinty, until the day after the levy of the writ of attachment.

There was evidence tending to show that he was informed by defendant and John McGinty about it fully before that day, & before the attachment was sued out. The books of the business house were exhibited,

and said books and the other evidence tended to show that the assets of the firm of Fitzpatrick & Bro.—on hand at the time of the death of J. C. Fitzpatrick, together with after acquired goods, moneys, and assets, had been applied indiscriminately to the payment of firm or partnership debts, & those contracted by the surviving partner in the subsequent conduct of the business, except $5,700 paid to John Mc-
70 Ginty, which was for money borrowed by him after his brother's death, on his individual note, & which was borrowed for and used in payment of a partnership debt. That the surviving partner had paid as many or more of the partnership debts in the aggregate than the amount which he had realized from strictly partnership assets, as existing at the death of his brother; that he had applied all the net assets received, after paying expenses of the business, to the payment of debts of the late firm, & to his own debt contracted for that business as surviving partner.

There was no other evidence tending to prove any other material facts.

Thereupon defendants asked the court to follow the law of the State in relation to the giving of instructions, and asked the following written instructions:

71 1st. If the jury believe from the evidence that the defendant, John J. Fitzpatrick, has discharged debts equal in amount to the whole assets of Fitzpatrick Brothers, disposed of by him, then he had the right and it was his duty to appropriate the proceeds of goods purchased by him after the dissolution of the partnership to debts of his own created by him after the termination of the partnership.

2. All that the law requires is that the assets of partnership shall be applied to the payment of the obligation of the firm.

3. A surviving partner has the right to prefer one creditor of the firm he is liquidating to another, and has the right, out of assets acquired afterwards, to pay debts made by him, after the dissolution of the partnership by the deaths of one member of the firm, and if the jury believe from
72 the evidence that he has appropriated the full amount of the value of the goods and assets of the firm of Fitzpatrick, disposed of to the payment of said debts, then the payment of debts made by said defendant after the dissolution are properly paid out goods purchased and assets acquired afterwards.

4. When a surviving partner continues business in his own name, and mixes the goods the former partnership with others bought by him, all that either a court of equity or law can require of him is to account for and pay to the representatives of the deceased partner or the creditors of the firm the full value of said goods and assets, and the profits thereon; and if he has creditors that have become so since, they are entitled to be preferred as to the balance remaining in his hands,
73 the same being the fruits of goods and money sold or lent to the surviving partner after the dissolution of the partnership.

5. If the jury believe from the evidence that Flannagans knew the true condition of the sale of Forbes' interest to defendant, they cannot claim that the debt was fraudulently contracted. The creditor must be deceived by the representations of the debtor, and must let have goods on because of this deception in order to maintain the charge of getting goods fraudulently.

6. The expectation on the part of a debtor preferring a creditor that he will be employed as a clerk by the creditor whom he prefers will not make the preference void.

7. The mere fact that the preference of one creditor delays or defeats

the claim of another creditor does not make the preference fraudulent.

74 8. While it is true that the representatives of a deceased partner or creditors of the late partnership may, at their election, treat goods bought by the surviving partner and put in stock for the purpose of continuing the trade as partnership property, and claim the profits of the continued business as assets of the partnership; yet, if they do so elect, the surviving partner will be entitled to have credit for the price paid for the new goods & other just expenditures in connection with the continued business.

9. If the jury find that Fitzpatrick & Bro. furnished a full, fair statement of their affairs to C. M. and G. M. Flannagan before they increased the indebtedness which they found existing when Fitzpatrick & Bro. succeeded Forbes & Fitzpatrick, they cannot be charged

75 with having contracted the indebtedness fraudulently.

10. It is not true that a preference is prima facie unfair. If the preference is fairly given it is valid and may be made without subjecting the debtor to attachment.

11. Although the jury may believe that the surviving partner did have an expectation of future employment when he made the sale, that fact alone will not effect the validity of the sale if it was otherwise fairly made for a fair price.

12. If the jury believe that the plaintiffs accepted that part of their debt secured to them by the assumption of Edward McGinty, the purchaser, and accepted such payment made by said McGinty as part of the consideration of the sale, with knowledge of the facts, then

76 plaintiffs are thereby esstopped and cannot question such sale.

The court declined to give any of said instructions so asked in that form, declining to be governed by the statutes on that subject.

Defendant excepted to the refusal to give said instructions separately for each refusal of each and every of his said instructions so asked.

The court then proceeded to charge the jury, to which course of proceeding defendant, by his counsel, then and there objected and excepted.

And the court then charged the jury as follows:

GENTLEMEN: The issues submitted to you, upon which you are to render your verdict, are as follows:

1st. Did or did not the defendant, at the time the affidavit read

77 to you as the foundation of this attachment, and at the time of the issuance of the attachment, had property or rights in action which he concealed and unjustly refused to apply to the payment of his debts.

2. Whether or not, before that time, the defendant had assigned and disposed of, or was then about to assign or dispose of his property or rights in action, or some part thereof, with intend to defraud his creditors or give an unfair preference to some of them.

3. Whether or not the defendant had then converted or was about to convert his property into money or evidences of debt, with intent to place the same beyond the reach of his creditors.

4th. Whether or not the firm of Fitzpatrick & Bros., com-

78 posed of defendant and James C. Fitzpatrick, deceased, and of which defendant is surviving partner, fraudulently contracted the debt claimed, or some part of it.

2. You are the sole judges of the weight to be given to the evidence

produced before you on both sides, but you will take the rules of law as they may be given to you by the court, and which you will apply to the facts as you may believe them to have been established by the evidence.

If you shall find that there are conflicts in the statements made by the witnesses, you will endeavor to reconcile the conflict. If, however, you fail in reconciling the conflict, if you shall find any, you will then carefully consider the evidence and determine which statement is
79 most probably the true one. In doing so, it is not necessary for you to find that either wilfully testified falsely. Your purpose should be only to find the truth. The burthen of proof is upon the plaintiff to reasonably satisfy you that these grounds of attachment, or some one of them, are true. If the testimony so satisfies you, you will return your verdict for the plaintiffs, but if it fails to do so, you will find your verdict for the defendant.

3. You will first ascertain from the testimony whether or not the defendant at the time the affidavit was made and attachment was sued out, had property or rights in action which he then had concealed, and refused to apply to the payment of his debts or the firm of which he is surviving partner. This issue is so plain that I do not think it
80 necessary to give to you any special instructions in regard to it.

4. The second issue presents more difficulty. The first branch of this issue is as to whether or not the defendant had assigned and disposed of, or was about to do so, his property or rights in action, or some part thereof, with intent to defraud his creditors. If you shall find from the evidence that the defendant sold or transferred any of the property or assets of the late firm of Fitzpatrick & Bros. with intent to prevent the creditors of the firm of Fitzpatrick & Bros., or any of them, from collecting their debts, such sale or disposition will sustain this ground of attachment. It was the duty of the defendant, as such surviving partner, to apply all of the assets of the firm to the payment of the debts due by the firm, and if he appropriated
81 any part of them to the payment of his individual debts, it was a fraud upon the firm creditors, whether he so considered it or not, and if established by the proof, will sustain this ground of attachment, as the law will presume that he intended the natural result of his act. The defendant being liable for the debts of the firm, could not by borrowing money and paying the debts of the firm create a creditor of the firm, or subrogate himself to the rights of the creditor as paid.

5th. The latter clause of this issue is as to whether or not the disposition made by the defendant of the assets was with the intention of giving an unfair preference to some of his creditors over others. It is difficult to determine what particular acts will constitute such preference. I am of opinion that the legislature meant something by
82 this expression, but which has never been construed by the supreme court of the State. In the absence of such construction, I will instruct you that when a debtor is insolvent, and knows that he will be unable for a great length of time to pay all his debts, and disposes of his means to one or more of his creditors to the exclusion of others, and with the design that those unpaid shall remain so, it will constitute an unfair preference within the meaning of this clause of the statute. You will therefore apply this rule to the facts in proof under this issue.

6th. The 3d issue is as to whether or not the defendant had then converted or was about to convert his property into money or evidences

of debt, with intent to place the same beyond the reach of his
83 creditors. The rules stated in relation to the second issue, so far as applicable, will apply to this issue. It is immaterial under those issues whether the property belonged to the defendant individually or was held by him as surviving partner of said firm, or of debts due by him individually or as such surviving partner.

7th. The last issue is as to whether or not the firm of Fitzpatrick & Bros., of whom defendant was a member, fraudulently contracted the debt, or some part of it, upon which this attachment was sued out. Upon this issue you will examine the evidence, and ascertain whether or not the defendant or his copartner made any fraudulent statements to plaintiffs, knowing at the time that such statements were untrue, for the purpose of obtaining the property or money forming in whole
84 or in part the consideration for the debt sued on. If the proof shows that the defendant or his copartner made a full and fair statement of their affairs to plaintiffs before any of the money or property was advanced, the fraud charged will be rebutted.

8th. Defendant had the right to pay one of the creditors of the said firm, provided in doing so there was no intention to defeat or for a great length of time to delay the payment of others of such creditors.

9th. If the proof shows that in making the contract with McGinty it was understood that defendant was to become a partner with McGinty, and receive a benefit thereby, the sale was fraudulent as to the firm creditors, but if no such understanding was then had a subsequent co-partnership would not have that effect.

85 10th. If the proof shows that the plaintiffs, with a full knowledge and approbation of all the transactions, accepted a portion of the proceeds of the sale, they will be estopped from setting up the fraud charged.

As stated, you will consider all the testimony, and return your verdict under the rules of law stated applied to the evidence.

The defendant then and there objected and excepted to the charge so given as to the parts thereof as follows:

He objected and excepted to so much of the charge No. 1 as states the 4th ground of attachment, because abstract, & because said 4th ground was added by amendment at the trial, & the attachment was not sued out on that ground.

He objected and excepted to the charge marked No. 3, because abstract & tending to mislead.

86 He objected and excepted to the 4th charge, because its reference to the application of the partnership assets to his private debts under the facts of the case was intended to instruct the jury that the payment to John McGinty was under the facts a payment of private debts out of partnership funds, as such subjected defendant to attachment. He objected to so much of the same charge as states that the defendant, being liable for the debts of the firm, could not by borrowing money & paying the debts of the firm create himself a creditor of the firm or subrogate himself to the rights of the creditor so paid, because it was abstract and misleading.

He objected & excepted to the 5th charge, because it was erroneous in law and a misinterpretation of the statute.

He objected & excepted to the 6th instruction, because it refers
87 to the 2nd, which was itself erroneous, & because abstract.

He objected and excepted to the 8th charge, because it tended to mislead the jury in view of the evidence, & to cause them to infer that defendant could not lawfully pay one creditor to the exclusion of an-

other, if the latter would be thereby defeated or delayed for a great length of time.

He objected and excepted to the 9th charge, because it was abstract and erroneous.

He objected & excepted to the 10th instruction, because of the improper qualification of the proposition by the use of the words "and approbation."

And said defendant now tenders this his bill of exceptions, & prays that same be signed and sealed, which is accordingly now done in term time, this 29th day of May, 1879, as witness my hand and seal.

R. A. HILL, [SEAL.]
Judge.

88 *Bill of exceptions.*

In the circuit court of the United States, southern district of Mississippi.

C. M. & G. M. FLANAGAN
v.
JOHN J. FITZPATRICK.

Be it remembered that this cause coming on again to be heard before a jury, on issue joined on the pleas of the defendant, on the 28th day of May, 1878, the following proceedings were had:

The plaintiffs introduced in evidence the several bills, notes, & acceptances described & counted on in their declaration, and filed therewith according to the statute of the State of Mississippi, and also evidence of C. M. Flanagan, to the effect that the defendant, J. J. Fitzpatrick, had stated to him in July, 1878, that he and J. C. Fitzpatrick, under the firm name of Fitzpatrick Bros., as successors of Forbes &
Fitzpatrick, had assumed and would pay the debts of Forbes &
89 Fitzpatrick, including the promissory note of Forbes & Fitzpatrick described in the declaration as having been made on the 22nd day of Dec., 1877, at Vicksburg, by the firm of Forbes & Fitzpatrick, then composed of Eugene A. Forbes & J. C. Fitzpatrick, payable to the plaintiffs twelve months after date in the sum of six thousand dollars.

That said Flanagans were then asked by the defendant to take the note of his present firm of Fitzpatrick & Bro., in lieu of the note of Forbes & Fitzpatrick, so as to release said Forbes, & that this request was refused.

The defendant was then introduced as a witness in his own behalf, and testified that the firm of Fitzpatrick & Bro. was formed by himself & J. C. Fitzpatrick on the 19th day of March, 1878, as follows:

That Eugene A. Forbes and J. C. Fitzpatrick had been partners, doing a wholesale grocery business in Vicksburg, Miss., under the firm
name & style of Forbes & Fitzpatrick. That defendant was
90 invited to come to Vicksburg by said last-mentioned firm for the purpose of buying the interest of said Forbes.

That by invitation of the latter he and his brother, J. C. Fitzpatrick, went to the residence of said Forbes to talk about the contemplated sale.

That when asked by defendant what he considered his interest worth, said Forbes, turning to J. C. Fitzpatrick, said, "Jim, you and I have made some curious trades in our time; now, suppose you write

down on a piece of paper what you consider to be the value of my interest, & I will do it also." This was done and the estimated value read off by J. C. Fitzpatrick was nine thousand dollars, while that read of' by Eugene A. Forbes was ten thousand dollars. That Forbes refused to take less than the sum named by him as the value as es-
91 timated by him, and that after consultation with his brother, and without examination of the books or stock, he purchased the interest of Forbes at the sum of $10,000.00, relying on the representations made by said Forbes and J. C. Fitzpatrick.

Witness was then asked to state what was the real value and how it was ascertained, and to give a statement of the value & amount of the assets & liabilities of Forbes & Fitzpatrick at the time of his purchase, and in response said that he and his brother and clerks had at once taken a full and complete inventory, & from that inventory, & from the books, gave the following answer:

Balance sheet, Forbes & Fitzpatrick, at close of March 18, 1878.

ASSETS.

Merchandize, stock, per inventory		$13,592 38
Accounts due, petty ledger	$4,322 33	
General ledger	26,630 60	
		30,952 93
Total		$44,545 31

LIABILITIES.

Accounts due to sundry parties		33,308 49
Bal., net worth, as per books		$11,236 82
E. A. Forbes' share	$6,051 02	
J. C. Fitzpatrick	5,185 80	
		11,236 82

92 He further testified that of the accounts transferred by Forbes & Fitzpatrick there remained due and uncollected to this day sundry accounts included in the assets above stated, $16,089.02, which were now uncollectable and of no value.

At the request of W. L. Nugent, of counsel for pl'ff, the court adds to this bill of exceptions the following:

There was evidence tending to show that the sale by Forbes to Fitzpatrick was fair and without misrepresentation. Eugene A. Forbes was the' introduced for the plaintiffs, who testified that when he had demanded $10,000.00 for his interest, and J. J. Fitzpatrick asked him to take less he declined, and told him to wait if he preferred until Mrs. Forbes recovered from a sickness, by which he was detained at home, & they would take an inventory & fix the price exactly,
93 and he would then reap the gain or suffer the loss, as it might turn out.

Plaintiffs then introduced sundry letters written by J. J. Fitzpatrick, tending to show that, after he had full knowledge of the true character & condition of the assets, property, and business which he had purchased from Forbes, he recognized the validity of the sale and the continued binding force of his assumption, & promised to pay

to the plaintiffs the note of Forbes & Fitzpatrick for $6,000 held by them, and forming part of the consideration of the sale by Forbes to defendant, & urged the pl'ffs to take the note of Fitzpatrick Bros. for the Forbes & Fitzpatrick note, and thus relieve said Forbes from liability.

This was all the evidence.

The defendant the following instructions, in writing:

94 *Instructions asked by defendant.*

1. If the jury believe from the evidence that the assumption of the note of Forbes & Fitzpatrick to Flanagan by the new firm of Fitzpatrick & Bro. was based on the sale by Forbes of his interest to J. J. Fitzpatrick, the defendant, then the consideration of the defendant's liability was the purchase from Forbes.

2. If the jury shall find that the defendant would have a good defense against the price of said purchase as against Mr. Forbes, then his defense, under the evidence, is equally good as against C. M. & G. M. Flanagan, & in that case the jury will take out the $6,000 note from the verdict which they may find on other accounts.

3. The jury are further instructed that the subsequent promises of J. J. Fitzpatrick to pay said note, not being based on any new con-
95 sideration, do not prevent him from setting up the defense as to that note.

4. In determining whether the defendant is liable for the $6,000 note of Forbes & Fitzpatrick, they will find for the defendant on that issue, if they believe that the defendant, J. J. Fitzpatrick, was misled by the representations of Mr. Forbes and his partner, J. C. Fitzpatrick, & thereby induced to undertake to pay a very much larger price than the assets were really worth, to an extent in excess of the note in question. In order to find this, it is not necessary for the jury to believe that Mr. Forbes or his partner intentionally deceived J. J. Fitzpatrick. It is sufficient if they find that he was grossly deceived by the representations made to him.

5. If the jury believe that there was a very large difference between the assumed & real value of the assets after deducting the lia-
96 bilities, so that the consideration for the undertaking of J. J. Fitzpatrick appear to be grossly inadequate, they may infer from this alone that the defendant was misled in such manner as to warrant his defense as against the $6,000 note of Forbes & Fitzpatrick.

6. If the jury find for the defendant as to that note, & for the plaintiffs as to the other cause of action, they will make up their verdict accordingly, omitting the note from their calculations.

The court refused to give any of the instructions so asked by the defendant as written, and the defendant excepted to this refusal to give each and every of said instructions so asked.

The court then, among other things not excepted to, instructed the jury, orally, as follows:

The plea of the defendant alleges as to the six thousand dollar
97 note of Forbes & Fitzpatrick that its payment was assumed as part consideration of a purchase by him from Eugene A. Forbes, & that said purchase was made on fraudulent misrepresentations as to the character & value of the things sold. If you believe this, and that the defendant was thereby injured, you will deduct from said note the amount of his damage by reason of such misrepresentations, unless you

shall find that the defendant, after he had a full knowledge of the misrepresentations, continued to recognize his liability to plaintiffs, and promised to pay, after he had acquired such knowledge, in which case he will be estopped to make such defense.

Defendant excepted to the oral instruction. The defendant then and there objected to that part of the instruction wherein the jury
98 were told that defendant would be estopped to make the defense under the conditions stated. And the court gave said instructions as set forth, notwithstanding defendant's objection, and defendant excepted thereto; and now, here in open court, presents this his bill of exceptions, and prays that the same be signed and sealed, which is accordingly now done, as witness the hand and seal of the presiding judge, this 28th day of May, A. D. 1879.

R. A. HILL. [SEAL.]

And on the 8th day of June the defendant, John J. Fitzpatrick, filed his writ of error in the words and figures following, to wit:

99 Supreme Court of the United States.

JOHN J. FITZPATRICK, SURVIVING PARTNER of Fitzpatrick Bros., pl'ff in error,
vs.
C. M. & G. M. FLANNAGAN, DEF'T IN ERROR.

Know all men by these presents that we, John J. Fitzpatrick, as principal, and Geo. M. Kline and John A. Kline, as sureties, are held and firmly bound unto Charles M. Flannagan and George M. Flannagan, copartners, doing business under the firm name and style of C. M. & G. M. Flannagan, in the sum of five hundred dollars, to be paid to the said C. M. and G. M. Flannagan, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these pres-
100 ents. Sealed with our seals, and dated this 5th day of June, 1879.

Whereas the above-bound John J. Fitzpatrick hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Mississippi:

Now, therefore, the condition of this obligation is such that if the above named John J. Fitzpatrick shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

JOHN J. FITZPATRICK. [SEAL.]
J. M. KLINE. [SEAL.]
GEORGE M. KLINE. [SEAL.]

I approve the foregoing bond, with the sureties thereto, June 7, 1879.

R. A. HILL, *Judge.*

101 And on the 8th day of June, A. D. 1879, the following writ of error was issued in said cause, to wit:

102 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Mississippi, greeting:

Because in the records and proceedings, and also in the rendition of the judgement of a plea which is in said circuit court before you, between Charles M. Flannagan and George M. Flannagan, copartners, doing business under the firm-name and style of C. M. & G. M. Flannagan, and John J. Fitzpatrick, surviving partner of Fitzpatrick Bros., a manifest error hath happened, to the great damage of the said John J. Fitzpatrick, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,
103 together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief Justice of the said Supreme Court, and the seal of said circuit court hereto affixed, at office, the 8th day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] JAS. M. McKEE, *Clerk.*

104 And on the 8th day of June, 187 , the following citation was issued in said cause, to wit:

105 UNITED STATES OF AMERICA, *ss:*

To C. M. & G. M. Flannagan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi, wherein John J. Fitzpatrick is plaintiff and you are defendant in error, to show cause, if any there be, why the judgement in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. R. Waite, Chief Justice of the said Supreme Court of the United States, this 8 day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

R. A. HILL, *Judge.*

106 Service of the within citation acknowledged this June 18, 1879.

CATCHINGS & INGERSOLL,
Att'ys for C. M. & G. M. Flanagan.

Attest:
D. M. PORTERFIELD.

D. M. Porterfield, being by me duly sworn, states that the above is the genuine signature of Thos. C. Catchings, one of the firm of Mess. Catchings & Ingersoll, atto's.

June 18, 1879.

[SEAL.]

LAZ. LINDSEY,
U. S. Com., U. S. Cir. Court.

(Indorsed:) Supreme Court of U. S. 2635. John J. Fitzpatrick, pl'ff in error, vs. C. M. & G. M. Flannagan, defendants in error. Citation. Filed June 8th, 1879. Jas. M. McKee, cl'k. Service acknowledged & returned June 18th, '79. J. M. McKee, cl'k. Pittman & Pittman, for pl'ffs in error.

107 In the circuit court of the United States for the southern district of Mississippi.

I, James M. McKee, clerk of the circuit court of the United States for the southern district of Mississippi, do hereby certify that the foregoing one hundred and four pages contains a true, full, and perfect transcript of all the pleas, process, and proceedings had and done in the circuit court of the United States for the southern district of Mississippi in a cause lately pending therein, wherein C. M. and G. M. Flannagan were plaintiffs, and John J. Fitzpatrick, defendant, as fully & completely as the same now remains of record in my office.

Given under my hand and the seal of said court hereto affixed, at office, in Jackson, in said district, this 24th day of July, A. D. 1879.

[SEAL.] JAS. M. McKEE, *Clerk.*

(Indorsement on cover:) No. 111. John J. Fitzpatrick, plaintiff in error, vs. Charles M. Flannagan and George M. Flannagan, copartners, under the firm-name and style of C. M. & G. M. Flannagan. S. Mississippi C. C. U. S. Filed 20th October, 1879.

6-1648

OFFICE SUPREME COURT U.S.
FILED
NOV 24 1882
JAMES H. MCKENNEY, Clerk.

IN THE

SUPREME COURT OF UNITED STATES,

No. 111.

—o—

JOHN J. FITZPATRICK, Surviving Partner of Fitzpatrick Brothers, PLAINTIFF IN ERROR.

vs.

CHARLES M. FLANNAGAN and GEORGE M. FLANNAGAN, Co-partners, doing business under the firm name and style of C. M. & G. M. Flannagan.

—o—

Argument of

ALFRED B. PITTMAN,

OF COUNSEL FOR PLAINTIFF IN ERROR.

—o—

JACKSON, MISS.:
CHARLES WINKLEY, STEAM BOOK AND JOB PRINT.,
CAPITOL STREET,
1882.

Supreme Court of the United States.

No. 111.

JOHN J. FITZPATRICK, Surviving partner of Fitzpatrick Brothers, PLAINTIFF IN ERROR.

vs.

CHARLES M. FLANNAGAN AND GEORGE M. FLANNAGAN, Co-partners, doing business under the firm name and style of C. M. & G. M. Flannagan.

—o—

Argument of

ALFRED B. PITTMAN,

OF COUNSEL FOR PLAINTIFF IN ERROR.

—o—

Statement of the Case.

This was an action of assumpsit commenced by attachment. The foundation of the writ was an affidavit in the form prescribed by law, made by G. M. Flannagan, setting forth three several grounds, viz:

"1. That the said John J. Fitzpatrick has property or rights in action which he conceals and unjustly refuses to apply to the payment of his debts.

"2. And that he has assigned or disposed of, or is about to assign and dispose of, his property or rights in action, or some part thereof, with intent to defraud his creditors, or given a unfair preference to some of them.

"3. And that he has converted or is about to convert his property into money, or evidences of debt, with intent to place it beyond the reach of his creditors."

After the parties had joined issue on pleas in abatement of the writ, denying the "grounds" of attachment, and on the day of trial the plaintiffs in attachment amended their affidavit by inserting as an additional "ground" the following, viz:

"That the firm of Fitzpatrick Bro's, composed of defendant and James C. Fitzpatrick, deceased, and of which he is the surviving partner, fraudulently contracted the debt, or incurred the obligation for which suit has been or is about to be brought."

Defendant objected to the allowance of this additional affidavit and excepted thereto. This exception was reserved by a special Bill of Exceptions. (See page 18 of Transcript Bill No. 1.) Discussion of this point will be found in Part 1, *post.*

The other questions growing out of the trial of the issues on the pleas in abatement, relate to the refusal of instructions asked and objections to instructions given. The most succinct statement of the case which is practicable is made in the Bill of Exceptions itself and we therefore extract from the Record, page 19:

Bill of Exceptions, No. 2.

Be it remembered, that this cause being on trial before a jury on this 23d day of May, 1879, on the issues joined on the defendant's plea in a abatement of the writ of attachment denying the grounds thereof, the following further proceedings were had:

The plaintiff had introduced evidence tending to show the following:

That in March, 1878, defendant had purchased the interest of Eugene A. Forbes in the firm of Forbes & Fitzpatrick, composed of said Forbes and one J. C. Fitzpatrick, on such

terms that the said J. J. and J. C. Fitzpatrick, under firm name of Fitzpatrick & Bro., and as successors of Forbes & Fitzpatrick assumed the debts of Forbes & Fitzpatrick. That among these debts were sundry sums due to the plaintiffs, then amounting to about $15,400, and other large sums to other creditors.

That the said James C. Fitzpatrick died on September 7th, 1878, leaving in the hands of defendant, J. J. Fitzpatrick, as surviving partner, the stock in trade and accounts and other assets of the late firm, being wholesale grocers, and at that time insolvent.

That at the time the defendant bought out the interest of E. A. Forbes and the new firm assumed all the debts of Forbes & Fitzpatrick, the debts so assumed exceeded, as was afterwards ascertained, the value of the firm assets and property.

That after the death of J. C. Fitzpatrick, the defendant continued the old business, sold the stock on hand in part, purchased other goods to replenish the said stock to upwards of twelve thousand dollars, partly on a credit and partly for cash, putting the goods indiscriminately in stock with those on hand.

That during the existence of the partnership, Fitzpatrick and Brothers had paid part of the debt assumed to plaintiffs, and had contracted other indebtedness with them for goods and money loaned, so that their indebtedness to plaintiffs remained about the same or nearly $15,000 00.

That the deceased partner before his death had drawn out of the partnership more than his interest therein, and was indebted to the firm. That on the third of December, 1878, the defendant, John J. Fitzpatrick, being sorely pressed to pay some maturing bills of the firm to the Mississippi Valley Bank, being debts created by the firm of Fitzpatrick Brothers, borrowed $5,700 00 from John McGinty, of New Orleans, giving his note, signed J. J. Fitzpatrick, payable one day

after date, verbally promising to re-pay the sum borrowed speedily out of the assets of the late firm.

That defendant devoted this money to the payment of the debts of the late firm of Fitzpatrick & Brothers, paying the same to the Mississippi Valley Bank.

That Fitzpatrick & Brothers, owed John McGinty also two notes, one for $2,500 00 and one for $5,200 00. That being unable to re-pay the money to John McGinty as promised, said defendant offered to sell out goods to him to make the payment of the whole debt due him, but said McGinty declining to purchase, promised to find a purchaser for the goods and assets. That on the 19th of December, 1878, said John McGinty returned to Vicksburg, with Edward McGinty, a kinsman of the former, who bought from Fitzpatrick all the stock of goods on hand, amounting to $6,633 46, as per inventory, at cost and ten per cent. added, and there was transferred to him at the same time accounts due, amounting to $10,222 06. Said Edward McGinty paid $8,200 00 in cash, and assumed to pay obligations due in part from Fitzpatrick, the surviving partner, for commercial debts created by him since the death of J. C. Fitzpatrick, to amount of $6,974 16.

That said Edward McGinty has paid several thousand dollars more on the debts assumed than he has collected out of the assets transferred; that the price paid by Edward McGinty was a full and fair value for the goods and accounts.

That said Edward McGinty was himself without means and had been furnished by John McGinty with the money to make these payments.

There was also evidence tending to show that Edward McGinty, John McGinty, and J. J. Fitzpatrick understood that the money paid by the said Edward was to be paid by Fitzpatrick to John McGinty on the debts due to the latter.

The $8,200 00 was handed to Edward McGinty by J. J. Fitzpatrick to hand to John McGinty in payment of the two

notes for $5,700 00 and $2,500 00 to the latter, and Edward McGinty paid the money to John McGinty.

That Edward McGinty entered into contract with John J. Fitzpatrick on December 20th, in the evening after the sale, by which contract Fitzpatrick was employed as a clerk to carry on the business under Edward McGinty, and for the benefit of the latter, at a salary of $2,500 00 per annum, payable monthly. The business was conducted under the name of Fitzpatrick & McGinty. That shortly afterwards, on December 24th, 1878, the defendant and Edward McGinty inserted an advertisement in one of the papers to the effect that they had, on December 20th, 1878, formed a partnership, and that the business would be conducted under the name of Fitzpatrick & McGinty, at the old stand. There was evidence tending to show that Fitzpatrick expected to be employed on same terms by McGinty, but no other evidence tending to show a promise or understanding to that effect.

There was evidence tending to show that the plaintiffs had advised defendant to sell an interest in the business to said Forbes, and form a partnership with him. It was also shown that one of the debts assumed and paid by Edward McGinty, as part of the price of his purchase, was a debt or debts to the plaintiffs for goods bought by the defendant after the death of his late partner. Plaintiff testified that he did not know how these debts were paid, or were to be paid, or the terms and conditions of the alleged sale to Edward McGinty, until the day after the levy of the writ of attachment.

There was evidence tending to show that he was informed by defendant and John McGinty about it fully before that day, and before the attachment was sued out. The books of the business house were exhibited, and said books and the other evidence tended to show that the assets of the firm of Fitzpatrick & Brother, on hand at the time of the death of J. C. Fitzpatrick, together with after acquired goods, moneys,

and assets, had been applied indiscriminately to the payment of firm or partnership debts, and those contracted by the surviving partner in the subsequent conduct of the business, except $5,700 00 paid to John McGinty, which was money borrowed by him after his brother's death on his individual note, and which was borrowed for and used in payment of a partnership debt. That the surviving partner had paid as many or more of the partnership debts in the aggregate than the amount which he had realized from strictly partnership assets, as existing at the death of his brother. That he had applied all the net assets received, after paying expenses of the business, to the payment of debts of the late firm, and to his own debt contracted for that business as surviving partner.

There was no other evidence tending to prove any other material facts.

Thereupon, defendants asked the Court to follow the law of the State in relation to the giving of instructions, and asked the following written instructions:

1st. If the jury believe from the evidence that the defendant, John J. Fitzpatrick, has discharged debts equal in amount to the whole assets of Fitzpatrick Brothers, disposed of by him, then he had the right and it was his duty to appropriate the proceeds of goods purchased by him after the dissolution of the partnership to debts of his own created by him after the termination of the partnership.

2d. All that the law requires is that the assets of the partnership shall be applied to the payment of the obligation of the firm.

3d. A surviving partner has the right to prefer one creditor of the firm he is liquidating, to another, and has the right, out of assets acquired afterwards, to pay debts made by him, after the dissolution of the partnership by the death of one of the members of the firm, and if the jury believe from the evidence that he has appropriated the full amount of the value of the goods and assets of the firm of Fitzpatrick Bros., disposed

of to the payment of said debts, then the payment of debts made by said defendant after the dissolution are properly paid out of goods purchased and assets acquired afterwards.

4th. When a surviving partner continues business in his own name, and mixes the goods of the former partnership with others bought by him, all that either a court of equity or law can require of him is to account for and pay to the representatives of the deceased partner or the creditors of the firm the full value of said goods and assets, and the profits thereon, and if he has creditors that have become so since, they are entitled to be preferred as to the balance remaining in his hands, the same being the fruits of goods sold or money lent to the surviving partner after the dissolution of the partnership.

5th. If the jury believe from the evidence that Flannagans knew the true condition of the sale of Forbes' interest to defendants, they cannot claim that the debt was fraudulently contracted, the creditor must be deceived by the representations of the debtor, and must let him have goods on time because of this deception in order to maintain the charge of getting goods fraudulently.

6th. The expectation on the part of a debtor preferring a creditor that he will be employed as a clerk by the creditor whom he prefers will not make the preference void.

7th. The mere fact that the preference of one creditor delays or defeats the claim of another creditor does not make the preference fraudulent.

8th. While it is true that the representatives of a deceased partner or creditors of the late partnership may, at their election, treat goods bought by the surviving partner and put in stock for purpose of continuing the trade as partnership property, and claim the profits of the continued business as assets of the partnership; yet, if they do so elect, the surviving partner will be entitled to have credit for the price paid for the new goods and other just expenditures in connection with the continued business.

9th. If the jury find that Fitzpatrick & Brother furnished a full fair statement of their affairs to C. M. & G. M. Flannagan before they increased the indebtedness which they found existing when Fitzpatrick & Brother, succeeded Forbes & Fitzpatrick, they cannot be charged with having contracted the indebtedness fraudulently.

10th. It is not true that a preference is *prima facie* unfair. If the preference is fairly given it is valid and may be made without subjecting the debtor to attachment.

11th. Although the jury may believe that the surviving partner did have an expectation of future employment when he made the sale, that fact alone will not effect the validity of the sale, if it was otherwise fairly made for a fair price.

12th. If the jury believe that the plaintiffs accepted that part of their debt secured to them by the assumption of Edward McGinty, the purchaser, and accepted such payment made by said McGinty as part of the consideration of the sale, with knowledge of the facts, then plaintiffs are thereby estopped and cannot question such sale.

The Court declined to give any of said instructions so asked in that form, declining to be governed by the statutes on that subject.

Defendant excepted to the refusal to give said instructions separately to each refusal of each and every of his said instructions so asked.

The Court then proceeded to charge the jury, to which course of proceeding, defendant, by his counsel, then and there objected and excepted.

And the Court then charged the jury as follows:

GENTLEMEN: The issues submitted to you upon which you are to render your verdict, are as follows:

1st. Did or did not the defendant, at the time the affidavit read to you as the foundation of this attachment, and at the time of the issuance of the attachment, have property or rights

in action which he coucealed and unjustly refused to apply to the payment of his debts.

2d. Whether or not, before that time, the defendant had assigned and disposed of, or was then about to assign or dispose of his property or rights in action, or some part thereof, with intent to defraud his creditors or give an unfair preference to some of them.

3d. Whether or not the defendant had then converted or was about to convert his property into money, or evidences o debt, with intent to place the same beyond the reach of his creditors.

4th. Whether or not the firm of Fitzpatrick & Brothers, composed of defendant and James C. Fitzpatrick, deceased, and of which defendant is surviving partner, fradulently contracted the debt claimed, or some part of it.

2d. You are the sole judges of the weight to be given to the evidence produced before you on both sides, but you will take the rules of law as they may be given to you by the Court, and which you will apply to the facts as you may believe them to have been established by the evidence.

If you shall find that there are conflicts in the statements made by the witnesses, you will endeavor to reconcile the conflict. If, however, you fail in reconciling the conflict, if you shall find any, you will then carefully consider the evidence and determine which statement is most probably the true one. In doing so it is not necessary for you to find that either wilfully testified falsely. Your purpose should only be to find the truth, the burden of proof is upon the plaintiff to reasonably satisfy you that these grounds of attachment, or some one of them, are true. If the testimony so satisfies you, you will return your verdict for the plaintiffs, but if it fails to do so, you will return your verdict for the defendant.

3d. You will first ascertain from the testimony whether or not the defendant, at the time the affidavit was made and attachment was sued out, had property or rights in action which

he then had concealed, and refused to apply to the payment of his debts or the firm of which he is surviving partner. This issue is so plain that I do not think it necessary to give you any special instructions in regard to it.

4th. The second issue presents more difficulty. The first branch of this issue is, as to whether or not the defendant had assigned and disposed of, or was about to assign and dispose of, his property or rights in action, or some part thereof, with intent to defraud his creditors. If you shall find from the evidence that the defendant sold or transferred any of the property or assets of the late firm of Fitzpatrick & Brothers, with intent to prevent the creditors of the firm of Fitzpatrick & Brothers, or any of them, from collecting their debts, such sale or disposition will sustain this ground of attachment. It was the duty of the defendant, as such surviving partner, to apply all of the assets of the firm to the payment of the debts due by the firm, and if he appropriated any part of them to the payment of his individual debts, it was a fraud upon the firm creditors, whether he so considered it or not, and if established by the proof, will sustain this ground of attachment, as the law will presume that he intended the natural result of his act. The defendant being liable for the debts of the firm, could not, by borrowing money and paying the debts of the firm, create a creditor of the firm, or subrogate himself to the rights of the creditors as paid.

5th. The latter clause of this issue is as to whether or not the disposition made by the defendant of the assets was with the intention of giving an unfair preference to some of his creditors over others, it is difficult to determine what particular acts will constitute such preference. I am of the opinion that the Legislature meant something by this expression, but which has never been construed by the Supreme Court of the State. In the absence of such construction, I will instruct you that when a debtor is insolvent, and knows that he will be unable for a great length of time to pay all his debts, and disposes of

his means to one or more of his creditors to the exclusion of others, and with the design that those unpaid shall remain so, it will constitute an unfair preference within the meaning of this clause of the statute. You will therefore apply this rule to the facts in proof under this issue.

6th. The third is as to whether or not the defendant had then converted or was about to convert his property into money or evidences of debt, with intent to place the same beyond the reach of his creditors. The rules stated in relation to the second issue, so far as applicable will apply to this issue. It is immaterial under those issues whether the property belonged to the defendant individually or was held by him as surviving partner of said firm, or of debts due by him individually or as such surviving partner.

7th. The last issue is as to whether or not the firm of Fitzpatrick & Brothers, of whom defendant was a member, fraudulently contracted the debt, or some part of it, upon which this attachment was sued out. Upon this issue you will examine the evidence, and ascertain whether or not the defendant or his co-partner made any fraudulent statements to plaintiffs, knowing at the time that such statements were untrue, for the purpose of obtaining the property or money forming in whole or in part the consideration for the debt sued on. If the proof shows that the defendant or his co-partner made a full and fair statement of their affairs to plaintiffs before any of the money or property was advanced, the fraud charged will be rebutted.

8th. Defendant had the right to pay one of the creditors of the said firm, provided in doing so there was no intention to defeat, or for a great length of time, delay the payment of others of such creditors.

9th. If the proof shows that in making the contract with McGinty, it was understood that defendant was to become a

partner with McGinty and receive a benefit thereby, the sale was fraudulent as the firm creditors, but if no such understanding was then had a subsequent co-partnership would not have that effect.

10th. If the proof shows that the plaintiff, with a full knowledge and approbation of all the transactions, accepted a portion of the proceeds of the sale, they will be estopped from setting up the fraud charged.

As stated you will consider all the testimony, and return your verdict under the rules of law stated applied to the evidence.

The defendant then and there objected and excepted to the charge so given as to the parts thereof as follows :

He objected and excepted to so much of the charge No. 1 as states the fourth ground of attachment, because abstract, and because said fourth ground was added by amendment at the trial and the attachnent was not sued out on that ground.

He objected and excepted to the charge marked No. 3, bebecause abstract and tending to mislead.

He objected and excepted to the fourth charge, because its reference to the application of the partnership assets to his private debts under the facts of the case was intended to instruct the jury that the payment to John McGinty was under the facts a payment of private debts out of partnership funds, as such subjected defendant to attachment. He objected to so much of the same charge as states that the defendant, being liable for the debts of the firm, could not by borrowing money and paying the debts of the firm create himself a creditor of the firm, or subrogate himself to the right of the creditors so paid, because it was abstract and misleading.

He objected and excepted to the fifth charge, besause it was erroneous in law and a misinterpretation of the statute.

He objected and excepted to the 6th instruction, because it refers to the 2nd, which was itself erroneous and because abstract.

He objected and excepted to the 8th charge, because it tended to mislead the jury in view of the evidence, and to cause them to infer that defendant could not lawfully pay one creditor to the exclusion of another, if the latter would be thereby defeated or delayed for a great length of time.

He objected and excepted to the 9th charge, because it was abstract and erroneous.

He objected and excepted to the 10th instruction, because of the improper qualification of the proposition by the use of the words "and approbation."

The exception to the refusal of the court to follow the statutes of Mississippi, relating to the giving, or refusing written instructions as asked, is discussed *post* in Part II.

The several exceptions based on the refusal to give in substance instructions asked are discussed in Part III, *post.*

The several exceptions to the instructions given, are discussed *post* in Part IV.

Proceedings on Trial of Principal Action.

The declaration contains three distinct counts. (See Transcript pp. 5, 6, 7.

The first count is a declaration in the one count on twenty-two bills of exchange and two promissory notes.

The second count is as follows:

"Plaintiffs further aver, that on the 22nd, Dec, 1877, at Vicksburg, Miss., the firm of Forbes & Fitzpatrick, composed of Eugene A. Forbes, and the aforesaid J. C. Fitzpatrick, by their promissory note, for value received, promised to pay, twelve months after date, to plaintiffs, $6,000 00, and that said firm, without having paid the same, dissolved, and that the said James C. and John J. Fitzpatrick then organ-

ized the firm of Fitzpatrick Bros., who became the successors of said Forbes & Fitzpatrick, and by the terms thereof, and in consideration that the said Eugene A. Forbes withdrew and assigned his interest in all the assets of said firm to Fitzpatrick Bros., who by means thereof, became the owners thereof, the said Fitzpatrick Bros. undertook and promised to pay Plaintiffs said sum of money whenever requested to do so; yet Plaintiffs aver that defendants wholly disregarded their promise in this behalf, and have not paid said sum of $6,000 00 or part thereof."

Defendant demurred to the declaration because it "set forth in one and the same count several separate and distinct causes of action, based upon several separate and distinct alleged considerations."

This demurrer was overruled. Discussion of the point raised will be found in Part V, §1.

Defendant plead the statute of frauds to the 2nd count, above set forth "because said supposed promise was a special promise to answer for the debt of another person within the meaning of the statute" and was not in writing, &c. (See p. 16, Transcript.)

A demurrer to this plea was sustained. (See p. 17, Transcript.)

On the trial of the issues joined on the pleas of defendant, exceptions were reserved to the refusal of the court to give certain instructions asked, and also to the instruction given by the court. The substance and effect of all the evidence introduced on that issue, is stated in the Bill of exceptions as succinctly as practicable That, and the instructions asked and refused and those given by the court are as follows:

Bill of Exceptions

Be it remembered that this cause coming on again to be heard before a jury, on issues joined on the pleas of defendant,

on the 28th day of May, 1878, the following proceedings were had:

The plaintiff introduced in evidence the several bills, notes, and acceptances described and counted on in their declaration, and filed therewith, according to the statute of the State of Mississippi, and also evidence of C. M. Flanagan to the effect that the defendant, J. J. Fitzpatrick, had stated to him in July, 1878, that he and J. C. Fitzpatrick, under the firm name of Fitzpatrick & Bros., as successors of Forbes & Fitzpatrick, had assumed and would pay the debts of Forbes and Fitzpatrick, including the promissory note of Forbes & Fitzpatrick, described in the declaration as having been made on the 22nd day of December, 1877, at Vicksburg, by the firm of Forbes & Fitzpatrick, then composed of Eugene A. Forbes and J. C. Fitzpatrick, payable to the plaintiffs twelve months after date in the sum of six thousand dollars.

That said Flanagans were then asked by the defendant to take the note of his present firm of Fitzpatrick & Bro., in lieu of the note of Forbes & Fitzpatrick, so as to release said Forbes, and that this request was refused.

The defendant was then introduced as a witness in his own behalf, and testified that the firm of Fitzpatrick & Bro. was formed by himself and J. C. Fitzpatrick, on the 19th day of March, 1878, as follows:

That Eugene A. Forbes and J. C. Fitzpatrick had been partners, doing a wholesale grocery business in Vicksburg, Mississippi, under the firm name and style of Forbes & Fitzpatrick. That defendant was invited to come to Vicksburg by said last mentioned firm for the purpose of buying the interest of said Forbes

That by the invitation of the latter, he and his brother, J. C. Fitzpatrick went to the residence of said Forbes to talk about the contemplated sale.

That when asked by the defendant what he consided his in-

terest worth, said Forbes turning to J. C. Fitzpatrick, said: "Jim, you and I have made some curious trades in our time; now, suppose you write down on a piece of paper what you consider to be the value of my interest, and I will do it also." This was done and the estimated value read off by J. C. Fitzpatrick was nine thousand dollars, while that read off by Eugene A. Forbes was ten thousand dollars. That Forbes refused to take less than the sum named by him as the value as estimated by him, and that after consultation with his brother, and without examination of the books or stock, he purchased the interest of Forbes at the sum of $10,000 00 relying on the representations made by said Forbes and J. C. Fitzpatrick.

Witness was then asked to state what was the real value and how it was ascertained, and to give a statement of the value and amount of the assets and liabilities of Forbes & Fitzpatrick at the time of his purchase, and in response said that he and his brother and clerks had at once taken a full and complete inventory, and from that inventory, and from the books, gave the following answer.

Balance Sheet, Forbes & Fitzpatrick, at Close of March, 18th, 1878.

ASSETS.

Merchandise stock, per inventory.....	.....	$13,592 38
Accounts due, petty ledger.....	$4,322 33	
General ledger.....	26,630 60	30,952 93
		$44.545 31

LIABILITIES.

Accounts due to sundry parties.....	.....	$33,308 49
Bal. net worth, as per books.....	.....	11,236 82
E. A. Forbes' share.....	$6,051 02	
J. C. Fitzpatrick's share.....	5,185 80	
		$11,236 82

He further testified that of the accounts transferred by Forbes & Fitzpatrick there remained due and uncollected to this day sundry accounts included in the assets above stated, $16,089 02, which were now uncollectable and of no value.

At the request of W. L. Nugent, of counsel for plaintiff, the Court adds to this bill of exceptions the following:

There was evidence tending to show that the sale by Forbes to Fitzpatick was fair and without misrepresentation. Eugene A. Forbes was then introduced for the plaintiff, who testified that when he had demanded $10,000 00 for his interest, and J. J. Fitzpatrick asked him to take less he declined, and told him to wait, if he preferred, until Mrs. Forbes recovered from a sickness, by which he was detained at home, and they would take an inventory and fix the price exactly, and he would then reap the gain or suffer the loss as it might turn out.

Plaintiffs then introduced sundry letters written by J. J. Fitzpatrick, tending to show that, after he had full knowledge and condition of the assets, property and business which he had purchased from Forbes, he recognized the validity of the sale and the continued binding force of his assumption, and promised to pay to the plaintiff the note of Forbes & Fitzpatrick, for $6,000 held by them, and forming part of the consideration of the sale by Forbes to defendants. and urged the plaintiffs to take the note of Fitzpatrick Bros., for the Forbes & Fitzpatrick note and thus relieve said Forbes from liability.

This was all the evidence.

The defendant asked the following instructions in writing:

Instructions asked by Defendant.

1. If the jury believe from the evidence that the assumption of the note of Forbes & Fitzpatrick to Flanagan, by the new firm of Fitzpatrick & Bro., was based on the sale by

Forbes of his interest to J. J. Fitzpatrick, the defendant, then the consideration of the defendant's liability was the purchase from Forbes.

2. If the jury shall find that the defendant would have a good defense against the price of said purchase as against Mr. Forbes, then his defense, under the evidence, is equally good as against C. M. and G. M. Flanagan, and in that case the jury will take out the $6,000 note from the verdict which they may find on other accounts.

3. The jury are further instructed that the subsequent promises of J. J. Fitzpatrick to pay said note, not being based on any new consideration, do not prevent him from setting up the defense as to that note.

4. In determining whether the defendant is liable for the $6,000 note of Forbes & Fitzpatrick, they will find for the defendant on that issue, if they believe that the defendant, J. J. Fitzpatrick, was misled by the representations of Mr. Forbes and his partner, J. C. Fitzpatrick, and thereby induced to undertake to pay a very much larger price than the assets were really worth, to an excess of the note in question. In order to find this, it is not necessary for the jury to believe that Mr. Forbes or his partner intentionally deceived J. J. Fitzpatrick, it is sufficient if they find that he was grossly deceived by the representations made to him.

5. If the jury believe that there was a large difference between the assumed and real value of the assets after deducting the liabilities, so that the consideration for the undertaking of J. J. Fitzpatrick appears to be grossly inadequate, they may infer from this alone that the defendant was misled in such manner as to warrant his defense as against the $6,000 note of Forbes & Fitzpatrick.

6. If the jury find for the defendant as to that note, and for the plaintiff as to the other causes of action, they will make up their verdict accordingly, omitting the note from their calculations.

The court refused to give any of the instructions so asked by the defendant as written, and the defendant excepted to this refusal to give each and every one of said instructions so asked.

The court then, among other things not excepted to, instructed the jury, orally, as follows:

The plea of the defendant alleges as to the $6,000 note of Forbes & Fitzpatrick, that its payment was assumed as part consideration of a purchase by him from Eugene A. Forbes, and that said purchase was made on fraudulent misrepresentations as to the character and value of the things sold. If you believe this, and that the defendant was thereby injured, you will deduct from said note the amount of his damages by reason of such misrepresentations, unless you shall find that the defendant, after he had a full knowledge of the misrepresentations, continued to recognize his liability to plaintiffs, and promised to pay, after he had acquired such knowledge, in which case he will be estopped to make such defense.

Defendant excepted to the oral instruction. The defendant then and there objected to that part of the instruction wherein the jury were told that the defendant would be estopped to make the defense under the conditions stated. And the court gave said instructions as set forth, notwithstanding defendant's objection, and defendant excepted thereto; and now, here in open court, presents this his bill of exceptions, and prays that the same be signed and sealed, which is accordingly now done, as witness the hand and seal of the presiding judge this 28th day of May, A. D. 1879.

This exception will be discussed in Part VI.

Assignment of Errors.

Plaintiff in error assigns the following errors:

1st. The court erred in permitting plaintiffs to amend the affidavit of attachment by adding a new ground of attachment.

2d. In refusing to follow the statutes of Mississippi relating to instructions, and in giving instructions of its own writing.

3d. In refusing to instruct the jury substantially as requested in the several instructions prayed for by defendant, numbered respectively from one to twelve inclusive, on the trial of the pleas in abatement.

Defendant predicates error on refusal, as to each and every of said several instructions separately and independently, and refers to the same as set forth in the statement of the case.

4th. The court erred in giving the instructions on the trial of the issues on the pleas in abatement, in the several particulars pointed out in the exceptions taken thereto, as set forth in the statement hereinbefore made and defendant assigns each and every error as therein shown.

5. The court erred in overruling defendants demurrer to the declaration.

6. The court erred in sustaining the demurrer to the defendant's plea of the statute of frauds.

7. The Court erred in refusing to instruct the jury substantially as requested in the several instructions requested for the defendant on the trial of the issues on the pleas in bar, numbered 1, 2, 3, 4, 5, and 6, respectively as shown in the statement hereinbefore made.

ARGUMENT.

Part I.

First Assignment of Error.

"1st. The court erred in permitting plaintiffs to amend the affidavit of attachment by adding a new ground of attachment." (*Supra*, p. 2.)

This assignment involves the construction of §1483, of the Revised Code of Mississippi of 1871, then in force. The particular question is the meaning of "defective" in the provision allowing the amendment of defective affidavits. The section is as follows:

(AMENDMENT.)

"§1483. When it shall appear to the court, on exceptions taken by the defendant, or otherwise, that the sureties on any attachment bond are insufficient, the court shall direct the plaintiff to give a new bond, with good and sufficient security; and such bond shall be as valid, in all respects, as the original bond; and if the plaintiff shall fail to give a new bond, within the time required by the court, the attachment shall be dismissed; and in all cases where an attachment bond or affidavit may be defective, in any respect, or may be lost or destroyed, the plaintiff shall be allowed to file a new affidavit and bond, which shall be in all respects, as valid and binding, as if given at the commencement of the suit."

The other sections of the same Code relating to the subject are as follows:

(GROUNDS OF ATTACHMENT.)

"§1420. All attachments shall be predicated upon one or more of the following grounds, and no others: 1st, that the defendant is a foreign corporation, or is a non-resident of this state; or, 2d, that he has removed, or is about to remove him-

self, or his property, out of this state; or, 3d, that he so absconds, or conceals himself, that he cannot be served with a summons; or, 4th, that he has property or rights in action, which he conceals, and unjustly refuses to apply to the payment of his debts; or, 5th, that he has assigned or disposed of or is about to assign or dispose of his property or rights in action, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them; or, 6th, that he hath converted, or is about to convert his property into money, or evidences of debt, with intent to place it beyond the reach of his creditors; or, 7th, that he fraudulently contracted the debt, or incurred the obligation, for which suit has been, or is about to be brought."

(AFFIDAVIT REQUIRED.)

"§1421. Before any writ of attachment shall issue, the creditor, or his agent or attorney, shall make affidavit, before a judge of the supreme court, a justice of the peace, a clerk of the circuit court, a clerk of the chancery court, or the mayor or chief magistrate of an incorporated city or town, of the amount of his debt or demand, to the best of his knowledge and belief, stating how the same is due, whether by note, open account, or bond, or claimed as damages for breach of contract, or claimed under a penal law of the State."

"§1422. The affidavit shall also contain a statement of the existence of one or more of the seven grounds for attachment set forth in section 1420 of this act, not stated disjunctively, but conjunctively, except where one of the distinct grounds for attachment contains, within itself, two disjunctive matters."

(PLEAS IN ABATEMENT.)

"§1458. The ground or grounds, stated in an affidavit for attachment, shall not be considered conclusive on the defendant; but he may, at the first term, proceed to contest the same in the following manner:

"§1459. At the term to which the attachment is returnable, the defendant may file a plea in abatement of the attachment, traversing the ground or grounds upon which the writ was obtained.

"§1460. This plea shall be sworn to, and when it is filed, the issue shall be considered as formed, without any response to the plea.

"§1461. The court shall, at the first term, or as soon thereafter as practicable, and before any trial of the case on its merits, cause a jury to be empaneled, to try such issue, and determine, by their verdict, whether the attachment was wrongfully sued out or not."

The affidavit is the foundation of the jurisdiction. Its amendment, therefore, could never be allowed except in strict conformity with a statute permitting it. For that reason we submit that the meaning of the word "*defective*" should not be extended beyond its signification as commonly accepted. Its meaning, when used in respect to pleading at law is the same as its ordinary popular signification. We make a few citations to show in what light affidavits are regarded in attachment proceedings.

Clark vs. Roberts, Breese (*Ill.*) 222.

"The affidavit was necessary to give jurisdiction to the justice. It does not comply with the requisition of the statute; hence all the subsequent proceedings are void. City Mantz vs. Hendly, 2 Hen. and Munf., 308. The amendment of the affidavit will not help the previous illegal proceedings. An affidavit being the foundation of the proceeding by attachment, must be framed agreeable to the provision of the statute, otherwise the justice has no jurisdiction."

In Drake on Attachment, 5 Ed. Chap. V. on affidavit, the doctrine is fully sustained by the opinion of the author that the affidavit being a fundamental and jurisdictional pre-requisite

can not be amended unless authorized by law expressly applicable to such cases.

In *Brown vs. McCluskey*, 26 *Ga.* 577.

The court says in reference to this subject. "Can the affidavit be amended? It is difficult to conceive how an oath, which is a necessary preliminary step, can be so changed as to sustain any proceeding which is based upon it. It is true, that the attachment law of 1855–56 provides that no attachment shall be void in consequence of a failure to comply with the forms therein prescribed; still the right to amend would seem to be restricted to the "attachment." "bond," "declaration," and "return."

We add some definitions—

Webster's Unabridged Dictionary.

DEFECTIVE, —1. Wanting in substance, quantity, or quality; incomplete; lacking a part; not full, entire, or perfect; deficient; faulty; applied either to natural or moral qualities, as, a *defective* limb; *defective* timber; a *defective* copy or account; a *defective* character: *defective* rules.

Bouvier's Law Dictionary.

"DEFECT.—The want of something required by law."

It will be seen both from the etymology and definition of the word that it conveys the idea of something wanting which is necessary for *completeness* or *perfection.*

An affidavit setting forth one or more grounds of attachment, perfect, both in form and substance, can not be said to be *defective,* in any true sense of that word.

It will not alter the case whether the defect, which is allowed to be cured by an amendment, be one of form or substance. We may concede that one defective in substantive averment may be amended by adding the essentials which are wanting, and yet it would not authorize an amendment of this character.

The averment of the existence of one of the grounds constitutes the *entire scope* of the affidavit. There are other substantive averments, but they are such as relate to the plaintiff's status, bringing himself and his claim within the terms of the statute. The ground set forth is the *fundamental* part of it, and the addition of a new ground is the making of a new and *fundamentally different* affidavit, founding the jurisdiction already invoked and assumed on a totally different matter. This extraordinary jurisdiction is a structure which must stand, or fall on the foundation on which it is erected. It can not be transferred to another. By section 1458, the defendant may traverse the ground, and if successfully done the attachment falls.

If an affidavit is to be amended it must be for the *completion* or *perfection* of the defective affidavit. If a new one is filed it must be a *substitute* for the one on which jurisdiction was assumed, and can not support it on a different ground.

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Part II.

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Second Assignment of Error.

"2d. In refusing to follow the statute of Mississippi relating to instructions of its own writing." (*Supra, p.* 8.)

We find this court has heretofore decided this question adversely to the view of it taken by us.

But for these decisions we would have had confidence in the position that the requirements of our law were mandatory and operative on the practice in the Circuit Court of the United States. The Statute of Mississippi is as follows:

"§ 643. No judge in any cause, civil or criminal, shall sum up or comment on the testimony, or charge the jury as to the weight of evidence; but it shall be lawful for the judge

to charge the jury upon the principles of law, applicable to the case, at the request of either party; *provided*, that all instructions asked by either party, shall be in writing, and all alterations or modifications of instructions, given by the court to the jury, or refused, shall be in writing, and may be taken out by the jury on their retirement, the clerk having first marked all instructions by either party, or given by the court, as being given or refused, as the case may be; and all instructions so marked shall be a part ot the record, on appeal or writ of error, without a bill of exceptions. Instructions may be given either before or after the main argument to the jury commences."

—o—

Part III.

Third Assignment.

"3d. In refusing to instruct the jury substantially as requested in the several instructions prayed for by the defendant numbered respectively from one to twelve, inclusive on the trial of the pleas in abatement." (*Supra p.* 6.)

This assignment covers the exceptions to the refusal and failure of the court to give, in some form, the substance of the propositions embraced in the several requests for instructions.

Their discussion will include all that need be said relative to several objectionable instructions which put to the jury the contrary propositions. The first question as to which we find ourselves in disagreement, relates to the effect of the continuance of the business by the surviving partner.

The *quasi lien* of partnership creditors on partnership property, has given rise to a multitude of conflicting opinions. The doctrines which prevail in Mississippi must control this case. The rule referred to is enforced in Mississippi as a rule

of administration of assets in the courts of equity wherever the right to marshall assets devolves on the court in a case where the subject matter and the parties are before it. The existence of a *lien* however, has been always denied. It has never been admitted to exist in any form or degree that would trammel the dealing with such property by the *owners* as *owners*.

In a very early case it was affirmed that—

"The right to apply partnership property to the payment of joint debts, only exists as between partners themselves. They have a right to say that this equity shall no longer exist. A sale of the stock in trade by one partner to another, puts an end to that equity, and the joint property thereafter becomes the separate property of the purchasing partner, and is not liable in his hands to the claim of the joint creditors."

The effort was to subject the property as firm assets to firm debts.

In denying the pretensions of the partnership creditors to a superior lien, the court, citing *ex-parte Ruffin*, 6 *Ves.*, 119, and *ex parte Williams*, 11 *Ves*, 3, say: "It would open a wide door for imposition, if property which a man holds as his own, and upon the faith of which he is dealing with the world was allowed to be trammeled with secret and tacit liens because it had once been the subject of partnership rights."

Parish vs. Lewis, Freeman's Ch., 299.

It is well to explain that it is not contended that the surviving partner stands in the same relation to the parnership property that the purchasing partner did in the case last mentioned. It is cited and quoted merely to show how completely the existence of any actual right of the creditors in the property is denied.

In the later case (1866) of Freeman vs. Stewart, 41 Miss., 133, a creditor of a partnership filed his creditor's bill against the surviving partner and heirs at law of the deceased partner

to subject the partnership assets to the partnership debts. The court dismissed the bill for want of equity. The quotations below show how emphatically the existence of any sort of lien is denied.

"The bill proceeds on the idea that a joint creditor of the partnership has a lien on the assets of a partnership in the hands of the survivor, upon the death of one of the partners."

Again:

"And as a legal demand alone he cannot present it in a court of equity. And second, because having no lien himself, he cannot, by *himself*, and for his benefit alone, be heard in a court of equity to assert, *independently* of the surviving partners, *their* right to a lien (in equity,) on the assets of the partnership for the payment of the partnership debts. And hence, it is said by Judge Story in treating of this subject They (the creditors) have no lien; but they have something approaching a lien, of which, *with the assent of the partners entitled to the lien*, they may avail themselves, in a court of equity, *against the partnership effects*. Story on Partnership, p. 811, Sec. 360."

In the case of *Roach vs. Brannon*, 57 Miss., 490, decided in 1879, the court say:

"If, then, a firm creditor may sue out and levy an attachment upon firm assets, in the hands of a surviving partner, upon what grounds must he proceed? Must he aver and prove one of the specific grounds of attachment laid down in the statute, or will it be sufficient to show that the surviving partner is acting in violation of that *quasi* trust imposed upon him by law for the benefit of firm creditors? We have no hesitation in saying that he must bring his case strictly within the *letter* of the statute."

In the same case is a *dictum*, as follows:

"An application of firm assets to his individual debts would probably be regarded as a violation of that clause of the statute which forbids an unfair preference among creditors, *though as this record does not present that question, we express no decided opinion upon it.*"

The dictum relating to the clause about an unfair preference was not sustained in the later case of *Eldridge, et al. vs Philipson*, 58 Miss., which is cited and quoted from *post* p , in which the clause is declared to be entirely at variance with our law allowing preferences, and must be regarded as surplusage.

In the case of *Roach vs. Brannon, supra*, the absolute right of a surviving partner to make preferences is emphatically affirmed, and the right to have a rateable distribution emphatically denied.

We predicate on these authorities nothing more than the proposition that the general creditors of a partnership have no rights of their own in the property of the partnership, which makes any fair dealing or disposition of the property by its owner's illegal.

Now, evidence had been introduced to show that the deceased partner had largely overdrawn his share in the concern and that the surviving partner, having presumably stated accounts with the representative of the deceased, and without objection or interruption from them, had bought goods to replenish the stock to the amount of more than $12,000. No creditor had objected, nor could any of them have done more than sue the surviving partner and the representatives of the deceased partner, and obtain judgment and levy on the goods.

The request for instruction conceded more than was necessary. The 1st and 2d were—

"1st. If the jury believe from the evidence that the defendant, John J. Fitzpatrick, has discharged debts equal in

amount to the whole assets of the firm of Fitzpatrick Brothers disposed of by him, then he had the right, and it was his duty to appropriate the proceeds of goods purchased by him after the dissolution of the partnership to debts of his own, created by him after the termination of the partnership.

"2d. All that the law requires is that the assets of the partnership shall be applied to the obligations of the firm."

Instead of giving the substance of these propositions the court gave instruction four. *Supra, p* 10.

In view of the evidence before the jury and the instructions asked it was equivalent to giving to them the proposition that if the defendant had continued the business—replenished the stock with some new goods and then had applied any of the cash sales to current expenses or to paying in any part current bills for purchases that the second ground of the attachment was sustained.

In other words this "*quasi lien*, this "*derivative right*" of the creditor is such that the death of a partner necessitates the immediate destruction of the business and its good will and the sacrifice of the stock in trade. The real parties in interest, according to his honor's proposition, have not the right or the power to settle accounts and adjust interests between themselves, so that the business may proceed, but it must be so conducted in the future that the last yard of cloth and paper of pins must be separately dealt with. Under such a ruling a stock of goods could not be replenished. There would be no safe course but to close the doors and sell the goods at auction. The continuance of a retail business becomes speedily impracticable unless the shelves may be kept filled by suitable assortments.

The business, which came under the consideration of this court in the cases of *Hoyt vs. Sprague*, and *Francklyn vs. Sprague*, 103, *U. S.*, 613, was conducted in such a manner as to have rendered all the property subject to seizure under at-

tachment if it had been within the jurisdiction of his honor's court.

It was not sufficient under this ruling that the acts of the surviving partner were fair and not sufficient that a larger part of the entire assets went to the payment of the partnership creditors than the entire value of the partnership assets aggregated. That which would have been deemed just and equitable, and would have filled the requirements of a most exacting chancellor in a bill marshalling assets, was not sufficient to protect the defendant from attachment for a fraudulent disposition of his property. If the property is to be treated as the estate of a deceased and the surviving partner as the administrator then a writ of sequestration from chancery, for the dead man's property, to enforce the trust was the remedy and not an attachment against the surviving partner for the fraudulent disposition of *his* property or rights in action.

But we have seen by the case of *Freeman vs Stewart,* that the creditor has not enough of a *quasi lien* to maintain such a bill in equity; on *a fortiori* he has no such title in the property as renders its sale by a surviving partner fraudulent unless kept and dealt with separately.

The third and fourth requests which were refused and not given in substance, were based on the view of the law we have been discussing.

The 6th request is as follows:

"6th. The expectation on the part of a debtor preferring a creditor that he will be employed as a clerk by the creditor whom he prefers, will not make the preference void."

This request for instruction contained a proposition of law which was true and relevant to the case. The evidence tended to show that Fitzpatrick was employed as clerk almost immediately after the sale to McGinty. It was relied on as a

badge of fraud. The defendant was entitled to explain it and having the evidence before the jury was entitled to the instruction.

In the case of *Crawford vs. Austin*, 34 Md. Brent, J., said:

"Another objection, taken to the validity of the deed, is that McKean, Vanhaggen & Co., were made preferred creditors in it, because Austin expected to receive employment from them. Assuming this to be the meaning of Austin's testimony, it does not invalidate the deed. Preferences are no doubt always made from secret motives or inducements operating upon the mind of the grantor, but equity does not inquire into them, if the debts preferred are in good faith, and all the property of the grantor, without reservation, s dedicated to the use and benefit of creditors."

The 7th and 10th requests were refused and propositions given in their stead, which we have not been able to understand.

The second ground of attachment is as follows:

"2. And that he has assigned or disposed of, or is about to assign and dispose of, his property or rights in action, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them."

The construction of the words, "*or give an unfair preference to some of them*" was much debated in the lower court. The 7th request for an instruction shows the one maintained for the plaintiff in error. It was as follows:

"7th. The mere fact that the preference of one creditor delays or defeats the claim of another creditor does not make the preference fraudulent."

The court declining that view, gave the 5th instruction, *supra*, 10, *transcript* 23, in which he instructs that a preference, otherwise fair and honest, is unfair if made by an insolvent debtor, who "knows that he will be unable for a great length of time to pay all his debts, and disposes of his means

to one or more of his creditors to the exclusion of others, and with the design that those unpaid shall remain so," and directed the jury to apply that rule to this case.

Under the evidence it was equivalent to instructing the jury to sustain the attachment.

Since that trial the Supreme Court of Mississippi have construed the statute in accordance with the view set forth in the request.

In the case of *Eldridge, et al, vs. Philipson*, 58 Miss., 270, will by found an elaborate argument of the question. We make some extracts from that opinion:

This provision so far as it relates to "an unfair preference," was first introduced into the statutes of the State by the Code of 1857, art. 2, p. 372, It has not as yet received a direct construction in this court, though it has, as we believe, been frequently construed in the Circuit Courts, and generally, if not uniformly. interpreted in accordance with the views which we here announce. We have given the question that careful examination which its importance demands. The right of a debtor, insolvent, or in failing circumstances, to give a preference to one or more of his creditors, if it be *bona fide*, and with no intent to secure a benefit to himself, is a firmly established rule in the jurisprudence of this State. See *Farmer's Bank* vs. *Douglas*, 11 Smed. & M. 469; *Ingraham* vs. *Gregg*, 13 Smed. & M. 22; *Hunt* vs. *Knox*, 34 Miss. 656; *Mangum* vs. *Finucane*, 38 Miss. 354; *Wright* vs. *Henderson*, 7 How. 539. All of which cases were decided in reference to transactions prior in date to the Code of 1857. Since that time the rule has been also frequently recognized in this court. See *Savage v. Dowd*, 52 Miss. 278; *Surget v. Boyd*, 57 Miss. 485; *Kaufman v. Whitney*, 50 Miss. 138."

* * * *

"The law does not denominate any transaction as unfair which it tolerates and enforces as valid, whatever may be its

rity. A sanguine man would never know that, and a despondent one, who might think he knew it, might be the first to make a fortune. But what effect can such knowledge, if any one can be supposed to have it, have on the conveyance? In any one sense all insolvent men may be supposed to know it, and in another, no man can know it. If he is to judge by his present condition, they are all insolvent.

It is just as difficult—I may say impossible—to understand the other words, "*and with the design that those unpaid shall remain so.*" Now, what issue did he intend to put to the jury by those words? How are we to ascertain what a man intends to do in the future? We may sometimes judge of what a man intended to do—to accomplish by an act—we may determine his "*design*" in the sense of what purpose he sought to accomplish. But how a jury can determine that of two or more who are insolvent, and who make preferences to the exclusion of other creditors, one does it "with the design that those unpaid shall remain so," and another with the design that they shall *not* remain so, seems incomprehensible. The jury must have been sorely perplexed.

The 8th instruction is wholly inconsistent with the right or power to make a preference. If a man is insolvent and pays one or more creditors "to the exclusion of the rest," he must have an intention, by that act, "to defeat, or for a great length of time delay, the payment of others of such creditors," in the sense that he intends the natural and necessary consequence of his own act. Are we to inquire whether he paid one man so that he would not be able to pay another? Are we to inquire whether he was distressed, honestly grieved, that he could not pay *all*, or whether he rejoiced in his own downfall because it injured others of his creditors. In Bump on Fraudulent Conveyances, on p. 184, there are cited, to prove that a preference is not void merely because "other creditors lose their debts by reason of the debtors inability to meet all the

demands against him," about an inch and a quarter of cases printed in small type, *solid*. On page 186, of the same book, and one or two following that, a large number of other cases are cited to show that where preferences are allowable *they are allowable*, without reference to the fears, motives, intentions, affections, prejudices, hopes, expectations, caprices, or peculiar characteristics of the grantor, so that these things have not prevented him from making a legal, valid, assignment.

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Part IV.

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Fourth Assignment of Error.

"4th. The court erred in giving the instructions on the trial of the issues on the pleas in abatement, in the several particulars pointed out in the exceptions taken thereto as set forth in the statement hereinbefore made, and defendant assigns each and every error as therein shown," *supra pp.* 12, 13. *Trans. p*, 25.

The court in its instruction No. 1, set forth the grounds of attachment including among them the one added by amendment relating to the averment that defendant had "fraudulently contracted the debt," telling them that *that* constituted one of the *issues* submitted to them.

Exception was taken to that action of the court for two reasons then stated. 1st. Because it was abstract, and 2d, because that ground had been added by way of amendment.

The second cause of exception is a mere repetition of the objection to the allowance of the amendment and serves to show injury from the error. The proposition involved has already been considered *supra p.* 21.

The other objection is based on the fact that there was no evidence offered to sustain that ground of attachment, and it

ought not therefore to have been put to the jury as one of the instructions.

The bill of exceptions sets forth all the evidence, or the effect and tendency of it, concluding with the assertion—"*There was no other evidence tending to prove any other material fact.*"

A careful examination of the bill of exceptions will show that there was no testimony before the jury which justified the court in putting such an issue to the jury.

The objection to the 4th instruction was fully stated, and is set out in the bill of exceptions. *Trans., p.* 24.

The statement of the objection seems to vindicate its own validity. The money obtained by the sale of the goods to Ed. McGinty was applied to the payment of two debts of the late firm: one to Jno. McGinty for $2,500, and one to the Mississippi Valley Bank for $5,700. For convenience, Jno. McGinty, who was already a creditor of the firm to the extent of $7,700, handed to them the money, $5,700, to pay to the Miss. Valley Bank, on the 3d of December. It was some days before the sale could be perfected. It may be treated, for the sake of argument, as a sale to John McGinty, and the consideration was the payment of the two debts—one to himself, and one to the Mississippi Valley Bank. It will be observed that John McGinty was not the favored creditor by any means. With a debt of $7,700, he received only $2,500, the Miss. Valley Bank having been paid in full. That was the *substance* of the transaction. But the court, by its charge, put to the jury the idea that the *mode* by which this was accomplished was wrong and illegal, and, by holding the defendant to a more technical rule than if he had been a mere administrator, conveyed the idea that he had sought to make and treat himself as a creditor by subrogation.

Suppose A. an administrator, having to remit money for his estate, goes to his banker and takes out exchange for the

amount, promising to hand it in speedily, or on demand, out of the assets of the estate, and within a few days does so. There would be nothing immoral in such a transaction. It would not be an effort to make the banker a creditor of the estate—or an effort to bind the estate in any way, or to make himself a creditor, to enjoy any benefits by subrogation to the debt paid by the remittance. It would be a common and usual transaction. The banker would not be a creditor of the estate, nor would the administrator be paying his own private debt when he hands the money to the banker. If the transaction had been substantially different, if the money had been *borrowed* as a loan with which to carry on the new business, and then an effort had been made to bring it in by invoking the doctrine of subrogation because it had been used in payment of a firm debt, the instruction might have been proper; but the evidence tended to show that it was, in its *inception* and *conclusion*, *one* transaction. If it had been to the interest of plaintiff to so treat it, defendant could not have escaped it, because that was the real essence of the thing.

To apply such a technical rule as was done in that instruction to a transaction honest and moral in itself—to separate *one* transaction into several parts, and predicate *fraud* of the *parts* when the *whole* was confessedly *right*, seems to be unjust.

Suppose A, finding B, his friend, in a helpless and unconscious condition on the highway, should take from his pockets money and a watch and go off for assistance, and should he be indicted for theft. When he had proven his good character, his friendship for B, his return with help, and his timely restoration of the articles taken from the person of B, he would have established his innocence, as a good Samaritan, instead of a thief. What would be thought of a judge who would exclude this evidence on the ground that the restoration of stolen property does not purge the crime—that the fact that A. and B. were friends aggravated the offense, and

that any humane conduct in returning to his relief could not avail as an offset for the theft!

Certainly the jury ought to have been permitted to determine for themselves, the true and real substantial nature of the transaction, uncontrolled by the powerful influence of the presiding judge whose artificial isolation of the several parts of one transaction was taken by the jury as an authoritative announcement of the way in which the law treated the facts.

We submit that it was a most grave and injurious error.

The exception taken to the fifth instruction construing the words "unfair preference," has already been discussed in considering the refusal to give instruction requested. *Supra.*

The exception to the 6th instruction, and the third, was that they were both abstract, in putting to the jury as an issue the question whether defendant had been guilty of the 3d ground, as to which no evidence had been introduced.

The exception to the 8th instruction has been fully considered.

In concluding the discussion of the instructions which have been criticised, it should be added that the learned judge erred, if at all, by leaning too far to virtue's side, as he sees it. His long familiarity with the practice and principles of the bankrupt law, in whose administration he was distinguished for a relentless determination to see all property fairly and rateably distributed, has brought him to look with extreme hostility on every effort of an insolvent debtor to give any sort of preference to one or more creditors. As a result, he has rarely lacked the means of destroying them. Some infirmity of constitution is nearly always found in the instruments themselves, and if, perchance, one has escaped from internal self-destruct-

ive elements, it is sure to fall before a death-dealing blow from the outside.

But it seems to have escaped attention that preferences result as well from the judgments declaring the transfers void, and subjecting the property to attachments, as from the instruments themselves. The truth is that a court is helpless to prevent preferences when the law permits them; and the sooner all judges accept with resignation, the truth of their inability to remedy laws which are not to their liking, the more reliable and exact will become the administration of justice.

For the foregoing reasons we ask for reversal of the judgment sustaining the attachment.

Such reversal, under our statutes, will not affect the judgment on the debt, which stands or falls on its own merits. This we will now consider.

Part V.

It is not deemed necessary to argue the 5th, 6th, and 7th, assignments of error, *supra p.* 20.

We will briefly consider the exception to the oral instruction as to that part which maintains that defendant was estopped to make defense to the note made by *Forbes & Fitzpatrick*, and assumed by him in ignorance of the defense, if after having assumed it he continued to recognize his liability to plaintiffs and promised to pay after he had acquired knowledge of the defense. *Supra, p.* 19. *Trans.* 27.

The defendant assumed to pay a note of $6000, made by Forbes & Fitzpatrick, the latter being his brother. The note of Forbes & Fitzpatrick was not surrendered by plaintiffs and

no release of the makers of the note, no relinquishment of any security, nor any other consideration given *by them* at any time for the assumption.

Now the proposition of his honor is that a continued recognition of his liability under the original assumption, a promise that he would comply with that assumption, after knowledge of the misrepresentations which had induced it, but without any new consideration, estopped defendant from making the defense.

This we respectfully submit, is not the law.

A reiteration of a promise, an acknowledgement of its binding force, a continued recognition of its existence, after knowledge of the facts which are claimed to avoid the promise are circumstances which are admissible as evidence against the truth of the defense, but do not estop the defendant.

In order that these facts shall have the effect accorded to them by the court, it is necessary to show that the plaintiffs were deceived by them to their own injury. It would be necessary to show that they had been influenced by them to some irrevocable action which would result in their injury if defendants should now be permitted to show the truth of the matter. See *Davis vs. Bowmar*, 55 *Miss.* 671, 8 syllabus and p. p. 748–753. *Herman on Estoppel*, §323 *et seq; Hunley vs. Hunley*, 15 *Ala.*, 91; *Carter vs. Darby*, 15 *Ala.*, 696; *Grenl. on Ex.* §209. *Henshaw vs. Bessell*, 18 *Wall.*, 271 *and Brant vs. Virginia Coal and Iron Co.*, 93 U. S. 335. The several instructions asked for by the defendant stated the law which was applicable to the evidence, correctly, and their substance ought to have been given by the court.

For the errors assigned we ask reversal of the judgment.

Algernon Pittman

SUPREME COURT OF UNITED STATES,

No. 111.

—o—

JOHN J. FITZPATRICK, Surviving Partner of Fitzpatrick Brothers, PLAINTIFF IN ERROR.

vs.

CHARLES M. FLANNAGAN and GEORGE M. FLANNAGAN, Co-partners, doing business under the firm name and style of C. M. & G. M. Flannagan.

—o—

Argument of

W. K. INGERSOLL,

FOR THE DEFENDANTS IN ERROR.

———o———

JACKSON, MISS.:
CHARLES WINKLEY, STEAM BOOK AND JOB PRINT.,
CAPITOL STREET,
1882.

OFFICE SUPREME COURT U. S.
FILED
NOV 28 1882
A. McKENNEY, Clerk.

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FOR THE DEFENDANTS IN ERROR.

—o—

I.

C. M. and G. M. Flannagan sued out an attachment against Jno. J. Fitzpatrick as surviving partner of the firm of Fitzpatrick Brothers, which had been composed of himself and James C. Fitzpatrick deceased.

This attachment was based upon the three grounds of attachment stated in their affidavit. Trans. p. 2.

On the day set for the trial, the Flannagans, asked, and against the objection of Fitzpatrick, obtained leave to amend

their affidavit for the attachment, by adding thereto an additional ground: to-wit, that the firm of Fitzpatrick Bros. had fraudulently contracted the debt, or incurred the obligation for which suit had been brought.

The allowance of this amendment is assigned for error

The amendment was properly allowed under the following provision found in Sec. 1483, Miss. Code, 1871; "and in all cases where an attachment bond or affidavit may be defective in any respect, or may be lost or destroyed, the plaintiff shall be allowed to file a new affidavit and bond, which shall be, in all respects, as valid and binding, as if given at the commencement of the suit;" and under section 621, of said Code, which is as follows: "The Court shall have full power and authority to allow all amendments to be made in any pleading, or proceeding, *at any time before verdict*, so as to bring the merits of the controversy between the parties, fairly to trial, and may allow all errors and mistakes, in the name of any party or in the form of the action, to be corrected; and the court shall require all such amendments to be made on such terms, as to costs and delay, as may seem proper, to prevent surprise or undue advantage. Either party may except to the decision of the court, allowing or refusing amendments, and the same may be assigned for error."

It is not claimed that the defendant was surprised, or taken at undue advantage by the amendment, and no delay or continuance of the case was asked for. The sole objection is that the court had not the power to permit the amendment.

Amendments have always been allowed in Mississippi in the most liberal manner and upon the most liberal terms, to the end that justice may be done. The adding a new ground for attachment to the affidavit, stands upon the same footing, precisely, as the adding a new count to a declaration, and that has been allowed repeatedly.

If the parties had gone to trial, and it had been discovered

from the testimony that the debt had been fraudulently contracted, it would be denial of justice to say that the plaintiffs could not have availed themselves of that fact by adding to their affidavit, a new ground based upon it.

The allowance of the amendment did not alter the nature of the case. The plaintiffs averred that the defendant was subject to be attached.

The amendment was allowed in support of that averment, not in oppositionto it.

In view of the extreme liberality of the Mississippi Statute as to amendments, it is not perceived in what particular the court exceeded its power.

It will be shown further along, that even if the amendment was improperly granted, it furnished no ground for reversal.

II.

James C. Fitzpatrick died in September, 1878, leaving the defendant surviving partner.

He continued the business, replenishing the stock by purchasing other goods, some for cash and some on cred't.

The goods bought by him were mingled indiscriminately with those on hand at the death of his brother, and no separate account of them was kept for any purpose.

The old stock was sold along with the new, the old assets were converted into money, and the proceeds were applied indiscriminately to the payment of the firm debts, and those contracted for goods bought by him, and to the payment of a debt to John McGinty of $5,700 due from him.

At the time of the dissolution by the death of James C. Fitzpatrick the firm owed McGinty two notes—one for $2,500 and one for $5,200.

On December 3d, 1878, the defendant borrowed $5,700 from John McGinty, giving his individual note therefor.

The money received from McGinty, he applied to the payment of a firm debt due to the Miss. Valley Bank.

It will be observed that this was an individual loan effected by the defendant long after the dissolution, that it was evidenced by his note, signed in his own individual capacity, and that at that time no sale of the property or business was contemplated by the defendant to Jno. McGinty, Edward McGinty or anybody else.

On Dec. 19, 1878, Jno. McGinty came to Vicksburg with a young man named Edward McGinty, who was his kinsman. The next day the defendant transferred to Edward McGinty, all of the stock on hand and all other assets of the business, in consideration of $8,200, cash, and the assumption by him of debts due by his late firm, and by himself for goods purchased since the dissolution, amounting to $6,974 16.

Edward McGinty had no means with which to make the purchase.

This is the way it was effected:—

Jno. McGinty handed Edward McGinty $8,200; Edward handed the $8,200 to the defendant; the defendant handed the $8,200 to Edward with instructions to give it to Jno. McGinty in payment of the $2,500 note due him by the firm, and his individual note for $5,700. Edward obeyed instructions and handed the $8,200 to John; and so the parties stood just where they were when they commenced, except that Edward had obtained a paper title to the property.

But the defendant had no idea of giving up his connection with the business.

On this same day Edward entered into a contract with him by which, for a salary of $2,500 per annum, payable monthly, he was to carry on the business for Edward.

That is to say, that is the way the defendant and Edward now tell it, but their conduct is strangely inconsistent with the clerkship theory. Four days after the sale, the defendant

and Edward had inserted in one of the Vicksburg papers an advertisement to the effect that they had, on Dec. 20th, 1878, (the very day of sale) formed a partnership, and that the business would be conducted under the name of Fitzpatrick & McGinty, at the old stand.

The 10th instruction given by the court is as follows:— "If the proof shows that in making the contract with McGinty it was understood that defendant was to become a partner with McGinty, and receive a benefit thereby, the sale was fraudulent as to the firm creditors, but if no such understanding was then had, a subsequent co-partnership would not have that effect."

It was argued in the circuit court for the plaintiffs, that the foregoing facts clearly showed that the sale to Edward McGinty was a mere sham, fraudulently contrived between the two McGintys and the defendant, for the benefit of the defendant as well as of Jno. McGinty. If so, of course the transaction was null and void.

This instruction fairly put the question to the jury, and there can be little doubt that here the battle was fought and won.

The jury no doubt believed, as this court must believe, that it was understood and agreed before the sale, and as a part of the consideration therefor, that the defendant was to receive a direct benefit therefrom, either as a partner with Edward, or as his chief clerk at the very handsome salary of $2500 per annum, payable monthly. In view of the facts of the case and the 10th instruction, it is manifest that the controversy was decided upon its merits, and that the jury were not influenced by any errors which the court may have committed, conceding for argument sake that errors were in fact committed.

III.

The 4th instruction given by the court is as follows: "The second issue presents more difficulty. The first branch of this issue is as to whether or not the defendant had assigned and disposed of, or was about to do so, his property or rights in action, or some part thereof, with intent to defraud his creditors. If you shall find from the evidence that the defendant sold or transferred any of his property or assets of the late firm of Fitzpatrick & Brothers, with intent to prevent the creditors of the firm of Fitzpatrick & Brothers, or any of them, from collecting their debts, such sale or disposition will sustain this ground of attachment. It was the duty of the defendant, as such surviving partner, to apply all of the assets of the firm to the payment of the debts due by the firm, and if he appropriated any part of them to the payment of his individual debts, it was a fraud upon the firm creditors, whether he so considered it or not, and if established by the proof, will sustain this ground of attachment, as the law will presume that he intended the natural result of his act. The defendant being liable for the debts of the firm, could not by borrowing money and paying the debts of the firm create a creditor of the firm, or subrogate himself to the rights of the creditor as paid."

This instruction is full, clear, correct, and applicable to the facts of the case.

It was the duty of the defendant to apply all the firm assets to the payment of firm debts, and if he appropriated them to the payment of his individual debts, he was guilty of a fraud. A surviving partner cannot transfer the partnership effects to pay a debt of his own. An assignee taking the effects under such circumstances, with notice, would be but a trustee for the benefit of those really entitled.

Scott vs. Tupper, 8 S. & M., 290.

The act of a partner, (during the existence of the co-partner-

ship) in paying his individual debt with the partnership funds, is an illegal conversion of the funds, and the separate creditor can have no better title to the funds, than the partner himself had. Whether the creditor knew the property to be partnership property or not, seems not to be material.

Minor vs. Gow, 11 S. & M. 326.
Buck vs. Mosley & Mallory, 24 Miss. 172.

It was said by this Court, that if the separate creditor knew that he was paid with partnership funds, *he undoubtedly would be guilty of gross fraud; not only in morals but in law.*

Rogers vs. Batchelor, 12 Peters, 230.

"And if the securities or funds of the partnership are received in payment of the separate debt of one partner by his creditor, it will not be necessary for the partners to establish the fact, that the creditor knew at the time that it was a misapplication of the securities or funds; for the very nature of such a transaction ought to put him upon further inquiry; and however *bona fide* his conduct may be, it is a case of negligence on his part, which will not entitle him to recover against the partnership."

6th ed. Story on Part., top. p, 239, *et seq.*

If it would be a fraud, both in morals and in law, for an individual creditor to knowingly accept partnership assets in payment of his claim, it would likewise be a fraud both in morals and law for a partner to use partnership property in paying his individual debts. One proposition necessarily follows the other.

It would also be just as fraudulent for a surviving partner to appropriate partnership assets to the satisfaction of his individual liabilities, as it is for a partner to so appropriate partnership property, while the partnership is in existence, for there is no distinction in principle between the two cases.

In both there is an illegal conversion of the partnership property.

This proposition does not involve the idea that the creditors of a partnership have a lien upon the partnership property, enforceable at their pleasure. It is admitted that no such lien exists in their behalf. The fraud or illegal conversion, consists of the application by the surviving partner, of property which does not in fact belong to him, to the payment of his own creditors, who could not by law subject it to their claims, whereby, they get that which the partnership creditors had the right to resort to, and whereby, the surviving partner in direct violation of his duty and trust, obtains a direct benefit by the discharge of his debts.

He in truth, thereby wrongfully appropriates the partnership property to his own use.

IV.

The further proposition contained in the 4thins truction is also true, to-wit: that "the defendant being liable for the debts of the firm, could not, by borrowing money and paying the debts of the firm, create a creditor of the firm, or subrogate himself to the rights of the creditor as paid."

The dissolution of a partnership by the death of one of the members "completely puts an end to the power and authority of the surviving partners to carry on for the future the partnership trade or business, or to engage in new transactions, contracts or liabilities on account thereof. It is therefore the duty of the surviving partners, henceforth to cease altogether from carrying on the trade or business thereof."

6th Ed. Story on Part., Sec. 343.

He can make no new contract which will obligate the partnership assets.

"It is true that the legal title to the debts and choses in action belonging to a co-partnership, rests in a surviving part-

ner, and that he may appropriate the partnership property to the payment of the debts of the firm in any preferred manner which he may deem fit, and this without the assent of the personal representatives of the deceased partner; but this is always upon the *existing contracts and debts of the partnership, and not upon new contracts made by himself.*"

Bank of Port Gibson vs. Baugh, 9 S. & M., 302.

The facts of that case were these: Horace and J. M. Carpenter were partners, and their partnership was dissolved in 1836, by the death of Horace. The bill filed by the Bank of Port Gibson, alleged that at the death of Horace, the firm was indebted to the amount of $197,000; that J. M. Carpenter proceeded to pay the firm debts and liquidate the same, to make collections, and to do all acts necessary to effect a speedy settlement of the firm business; that during the years 1838 and 1839, being in want of large amounts of money, from time to time, for the purpose of paying off, liquidating, and arranging a large amount of debts owing by H. Carpenter & Co., contracted in the life-time of Horace, J. M. Carpenter as surviving partner, applied to the Bank, at various times for the purpose of obtaining loans and discounts; that for that purpose the Bank discounted the notes of H. Carpenter & Co., to the amount of $15,000, *on the faith of the responsibility of H. Carpenter & Co., believing that that firm was abundantly responsible for its liabilities*; that these discounts not being refunded, the Bank applied to the surviving partner for additional security, and he therefor gave them a note signed, "H. Carpenter & Co., per J. M. Carpenter, surviving partner," in lieu of those they held, and that to secure the same, he executed a mortgage on certain personal property.

The bill was taken for confessed against all the parties except Mrs. Baugh, and her husband. Mrs. Baugh was the widow of Horace Carpenter. They demurred to the bill.

J. W. Carpenter was also one of the executors of the will of Horace, and it was claimed that as executor he had the authority to do what he had done, even if he had not the authority as surviving partner.

The High Court of Errors and Appeals of Mississippi, said: "The ground assumed in the bill is, that the note and mortgage were executed by John M. Carpenter, as surviving partner and executor. As to his act in the first named capacity, without regard to any considerations of extraordinary powers added to that capacity from articles of co-partnership, or the will, it is sufficient to say, without multiplying authorities, that it is the admitted doctrine that the dissolution of the partnership disables any one of the partners from contracting new debts, or buying, or selling, or pledging goods on account of the firm.

The loans and discounts procured by John M. Carpenter, in 1838 *and* 1839, *were new contracts, and their liquidation by note and mortgage, in* 1840, *was also a new contract. The fact that the money thus procured was used in discharge of the debts of the partnership, does not change the nature of the contract by which that money was procured.*"

It was accordingly held that the firm assets were not liable to the Bank. This is an exceedingly strong illustration of the law. The money was advanced by the Bank to the surviving partner, to enable him to pay off firm creditors who were pressing him; he endeavored to bind the firm assets, signing the notes given by him as surviving partner; the money was not advanced on the credit of the surviving partner, but in the faith that the firm assets would be liable, and that they were ample to pay it back; and finally, the money was used by the surviving partner in paying off firm creditors, as it was intended to be used.

In the case at bar, J. C. Fitzpatrick borrowed $5,700 from John McGinty to pay the Mississippi Valley Bank, a firm

creditor, and did pay it to the Bank. He gave his individual note for it, payable one day after date.

As was said in the case of Bank of Port Gibson vs. Baugh, *et al, supra*, this loan procured by him from McGinty and his note therefor, were new contracts, and "the fact that the money thus procured was used in discharge of the debts of the partnership, does not change the nature of the contract by which that money was procured."

The Circuit Court was therefore correct in telling the jury in the 4th instruction, that "the defendant being liable for the debts of the firm, could not, by borrowing money and paying the debts of the firm, create a creditor of the firm, or subrogate himself to the rights of the creditor as paid."

The $5,700 borrowed from McGinty, was an individual debt due by the defendant, Fitzpatrick, and the firm assets could not lawfully be used by him in paying it, yet that is what was done. If the transfer had been made directly to John McGinty, in consideration of the cancellation and surrender by him of this note for the $5,700, it is clear that the transaction could not stand, for it would have been on its face a fraudulent and illegal conversion of the firm assets. To avoid this, Edward McGinty, a pauper kinsman of John McGinty, was lugged in. But the substance of the transaction is the same, for the $8,200 paid by him to Fitzpatrick, and by the latter, through him, to John McGinty, was John McGinty's own money, and it was understood beforehand, by them all, that this $5,700 was to be paid in this way.

The upshot of it all was, that the firm assets were in this way fraudulently applied to the payment of Fitzpatrick's individual debt to Jno. McGinty, and this must make the whole transaction fraudulent and void. Feeling the force of the foregoing, on page 38, of his brief, counsel attempts to evade it, but his statement is not borne out by the facts. He says: "The money obtained by the sale of the goods to Ed. McGinty

was applied to the payment of two debts of the late firm; one to John McGinty for $2500, and one to the Mississippi Valley Bank for $5,700. For convenience, Jno. McGinty, who was already a creditor of the firm to the extent of $7,700, handed to them the money $5700 to pay to the Mississippi Valley Bank, on the 3rd of December. It was some days before the sale could be perfected. It may be treated, for the sake of argument, as a sale to Jno. McGinty, and the consideration was the payment of the two debts, one to himself and one to the Mississippi Valley Bank."

This statemenf is not justified by the facts as set out in the bill of exceptions.

The money obtained by the sale of the goods was not applied to the payment of two debts of tne late firm; one to Jno. McGinty for $2500, and one to the Mississippi Valley Bank for $5700. The debt to the Bank had been paid long before the sale, with the money borrowed by Fitzpatrick on his individual note from McGinty.

The money obtained by the sale went to pay a firm debt to McGinty of $2500, and the surviving partners individual debt to him of $5700.

The idea is thrown out in the statement of counsel that a sale of the property to McGinty was contemplated at the time he advanced the $5700, and that as some days would be required to perfect the sale, he handed the money beforehand to Fitzpatrick, to pay the Bank as a matter of convenience.

Nothing of the sort appears from the testimony. On the contrary the bill of exceptions show that Fitzpatrick *borrowed* the money on his individual note, promising to *repay it* out of the firm assets, and that nothing was said about a sale of the property until he found that he would "be unable to *repay the money to John McGinty as promised.*"

The borrowing of the $5,700 from McGinty, and the subsequent sale were two entirely distinct and separate transactions.

The 4th instruction, it is again submitted, not only propounded the law correctly, but was singularly applicable to the facts of the case.

V.

One of the grounds for the attachment was that the said John J. Fitzpatrick had property or rights in action which he concealed and unjustly refused to apply to the payment of his debts, and that he had assigned or disposed of, or was about to assign or dispose of, his property or rights in action, or some part thereof, with an intent to defraud his creditors, or *give an unfair preference to some of them.*

When this case was tried, the meaning of the words, "or give an unfair preference to some of them," had never been settled by the Supreme Court of the State. The learned Judge in his 5th instruction defined their meaning as follows: "In the absence of such construction, (by the Supreme Court,) I will instruct you that when a debtor is insolvent, and knows that he will be unable for a great length of time to pay all his debts, and disposes of his means to one or more of his creditors to the exclusion of others, and with the design that those unpaid shall remain so, it will constitute an unfair preference within the meaning of this clause of the statute."

The statute afterwards was construed by the Supreme court in Eldridge, *et al,* vs. Philipson, 58 Miss., 270, and it was decided that the words, "or give an unfair preference to some of them," had the some meaning precisely as the words of the statute immediately preceding them. to-wit: "with intent to defraud his creditors."

The decision can have no practical effect upon this case, for the reason that the facts pointed out by the Circuit Court as those which would constitute an *unfair* preference, would really make a *fraudulent* preference. That is to say, if a debtor

should pay one or more of his creditors, with the design or intent that those unpaid should remain so, he would be disposing "of his property or rights in action, or some part thereof, *with intent to defraud his creditors.*" In other words, the distinction attempted to be drawn by the learned Judge, was "a distinction without a difference.

A debtor may unquestionably prefer one creditor to another, for this results from the dominion which every man has over his property, but he must act in good faith, and with no other purpose than to pay one creditor rather than another. If he is prompted to do so, by an intent to defeat his other creditors, then his intent is fraudulent, and this makes the preference a fraudulent one.

As this Court said in Drury vs. Cross, 7 Wall. 299: "If the law permits the debtor in failing circumstances, to make choice of the persons he will pay, *it denies him the right in doing it, to contrive that the unpreferred creditors shall never be paid.*" This language is exactly synonymous with that used by the Circuit Court, in defining what was meant by an unfair preference. No harm, therefore, could result from the distinction thought by the Circuit Court to exist, because if the plaintiffs had established the facts stated, they were entitled to a verdict, notwithstanding the preference was denominated an unfair one in the instruction. If made with the design that the unpreferred creditors should remain unpaid, the preference was fraudulent, and would sustain the attachment.

The 8th instruction is in these words: "Defendant had the right to pay one of the creditors of the said firm, provided in doing so there was no intention to defeat or for a great length of time to delay the payment of others of such creditors."

This is substantially the same as the 5th, which attempts to define what would constitute an unfair preference, and particular comment upon it is therefore unnecessary.

VI.

It is not claimed that the 7th instruction as to whether the debt was fraudulently contracted or not, is incorrect in point of law. It is objected to—first, because it is based upon the amendment to the affidavit for attachment, which, it is claimed, was allowed without authority; and second, because there were no facts to which it could be applied.

The first objection has been met by the discussion herein before, upon the authority of the court to permit the amendment.

It may be admitted that the testimony failed to show that the debt was fraudulently contracted, but it does not follow that the laying down the law to the jury upon the subject, is error, which can be complained of.

By this is meant that an immaterial error, or one which could not, in the nature of things, have operated prejudicially, cannot be availed of in an appellate court, as cause for reversal.

The instruction upon this point, (No. 7) as follows:

"The last issue is as to whether or not the firm of Fitzpatriek & Bros., of whom defendant was a member, fraudulent contracted the debt, or some part of it, upon which this attachment was sued out. Upon this issue you will examine the evidence, and ascertain whether or not, the defendant, or his co-partner, made any fraudulent statements to plaintiffs, knowing at the time that such statements were untrue, for the purpose of obtaining the property or money forming in whole or in part, the cousideration for the debt sued on. If the proof shows that the defendant, or his co-partner made a full and fair statement of their affairs to plaintiffs, before any of the money or property was advanced, the fraud charged will be rebutted."

If there was no proof of the character indicated, it is difficult to perceive how the jury could be misled by this instruction, or how any prejudice to the defendant could result from it In fact however, it was not wholly inapplicable to the facts as developed by the testimony. The bill of exceptions show on its face that it does not contain all the testimony. Many facts are omitted, only those being inserted which the judge deemed material, or necessary to be considered here.

VII.

As to the $6000 note of Forbes & Fitzpatrick which Fitzpatrick Bros., had assumed to pay, in consideration of the sale of his interest by Forbes to J. J. Fitzpatrick, the court, (Trans 27.) instructed the jury as follows: "The plea of the defendant alleges as to the six thousand dollar note of Forbes & Fitzpatrick that its payment was assumed as part consideration of a purchase by him from Eugene A. Forbes, and that said purchase was made on fraudulent misrepresentations as to the character and value of the things sold. If you believe this, and that the defendant was thereby injured, you will deduct from said note the amount of his damage by reason of such misrepresentations, unless you shall find that the defendant, after he had a full knowledge of the misrepresentations, continued to recognize his liability to plaintiff, and promised to pay, after he had acquired such knowledge, in which case he will be estopped to make such defense."

It does not appear that any representations were ever made by Forbes as to the condition of the business or the value of the assets.

Nor does it appear that the sums stated by Forbes and his then partner, J. C. Fitzpatrick, as the value, in their respective opinions, of his interest, were based alone upon the estimated value of the assets of the firm.

The business was old and well established, and the value of Forbes' interest could not be measured by the value of the actual tangible property of the firm. The business, with its line of customers, its credit, and commercial standing had a value aside from that of the assets, and the value of Forbes' interest was manifestly fixed by himself and his partner, with reference to this.

Again, it was impossible to fix with precision the value of the accounts due to the concern, and that they may have turned out to be of less value than the estimate put upon them, is no defence in the absence of fraud, which is not shown to have been practiced.

Now, after making the purchase, (Trans. 26,) the defendant, in letters to the plaintiffs, recognized the validity of the sale, and the continued binding force of his assumption, promised to pay the note, and urged them to take the note of Fitzpatrick Brothers, in lieu of that of Forbes & Fitzpatrick, so that Forbes might be relieved from further liability.

It appears fully that there were no representations made by Forbes, beyond his opinion written down on the slip of paper, that his interest was worth $10,000. The defendant did not consider that as a positive assertion that the interest was worth that sum, nor did Forbes design it so to be understood, or acted upon as such. On the contrary, he told the defendant "to wait, if he preferred, until Mrs. Forbes recovered from a sickness, by which he was detained at home, and they would take an inventory and fix the price exactly, and he would then reap the gain or suffer the loss, as it might turn out."

Fitzpatrick says, that he made the purchase after consultation with his brother, without examining the books or stock, and relying on the representations made by Forbes and his brother.

There was then no attempt to defraud him by false representations, and no concealment of anything from him. He could have waited and had an examination of the business before buying, but he preferred to buy at once. relying on what had been said at this interview, and what was afterwards said to him by his brother in the consultation with him. He bought with his eyes open, and took the chances.

No warranty can be predicated of the statement of Forbes, because, first, what he said was not intended to have the effect of a warranty; and, second, it was not said to induce the defendant to rely on it in order to effect the sale; and, third, the defendant did not rely on it, but evidently depended upon what he learned from his brother, concerning the business.

Otto vs Alderson, 10 S. & M., 476.

A purchaser of personal property buys at his own risk, unless the seller gives an express warranty, or the law implies one from the circumstances of the case, or unless the seller be guilty of a fraudulent representation or concealment, in respect to a material inducement to the sale.

Ib: Simmons vs. Cutreer, 12 S. & M., 584.

"With regard to the quality or goodness of the article sold, the seller is not bound to answer, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he has made a fraudulent representation or used some fraudulent concealment concerning them, and which amounts to a warranty in law."

2 Kent Com. 9th Ed. 643.

Mixer vs. Coburn, 11 Metc., 559.

If the defendant had actually paid to Forbes the $10,000 in money, would it be pretended that under the circumstances attending the sale, he could have recovered it from him, when

he discovered the true value of the interest purchased, upon the ground that Forbes had warranted the value to equal $10,000, or had fraudulently represented it to be that much in value, and that he had bought upon such representation?

Surely no such claim would be made. Yet that is the test, for if he could not have recovered the purchase money in a direct action for that purpose, he cannot prevent a recovery upon his promise to pay, either totally or partially.

In this view of the case, the defendant was clearly not entitled to prevent the recovery upon his promise to pay the $6,000 note, and it is therefore unnecessary to trouble the court with a discussion of the proposition contained in the instruction, that a subsequent recognition of the promise, after he had acquired full knowledge of the value of the business would estop him from defending upon the ground attempted.

If that part of the instruction had been omitted, the plaintiff would have been entitled to recover, and the result would necessarily have been the same, so that the error, if one was committed, did not operate harmfully.

VIII.

A careful inspection of the instructions, and of the facts, will show, it is respectfully submitted, that the case was fairly tried upon its merits, and that the law applicable, was fully and fairly stated to the jury. The court was not bound to instruct the jury as prayed by the defendant, and no error can be predicated of the refusal so to instruct, unless it can be shown, that the instructions given, are incorrect and do not cover the case, and further, that those refused stated the law correctly, and that if given a different result should have been reached.

The 4th instruction given by the court, was given in lieu of the 1st, 2d, 3d, 4th and 8th requests of the defendant.

They involve the proposition, that if a surviving partner of his own means, pays to firm creditors, a sum equal to the value of the partnership assets, he may deal with the firm assets as he pleases.

This is not the law. He cannot lawfully use the partnership property in paying his individual debts under any circumstances.

If he pays firm creditors with his individual means, no equity exists in his behalf, which will entitle him to reimburse himself, either directly or indirectly, as against the firm creditors out of the firm assets. "If any partner has made advances to the firm, and others have received advances from it, these do not constitute debts, strictly speaking, until the concern is wound up, but only as items in the account between the partners."

Story on Part., 6th Ed., sec. 348, *a*.

Richardson vs. Bank of England, 4 Myl. & C., 165.

The same rule applies necessarily where a surviving partner makes advances to pay off firm debts. He is not thereby made a creditor, in the sense that one to whom the firm is indebted, is a creditor; nor does the person from whom he may borrow money with which to pay firm creditors, become a firm creditor, as was decided in the case of the Bank of Port Gibson vs. Baugh, 9 S. & M. 302. His duty to apply the partnership assets to the payment of partnership debts, never ceases, so long as any of them remain unpaid.

When this is done, advances made by him individually, are proper items in the account between him and the representatives of the deceased partner, but they can, under no circumstances, be set up, directly or indirectly, in opposition to the claims of the partnership creditors. This is because he is

individually liable for the partnership debts, and it his duty to pay them without reference to the sufficiency of the partnership assets, and because the title to the partnership property is vested in him for the sole purpose of enabling him to apply it to the payment of partnership debts. When he makes use of it therefore, in paying his individual debts, he is guilty of an illegal and fraudulent conversion of it.

It might be, that in a proceeding by the representatives of his deceased partner to hold the defendant liable for the profits earned in continuing the business, he would be entitled to an allowance for all just expenses in conducting the business, including debts for goods purchased, but that doctrine is not applicable to this case.

This is not a proceeding of that kind. It is a suit at law by partnership creditors, based upon the claim that he has unlawfully disposed of partnership property, and he cannot justify himself for applying partnership property to his individual debts, as he might in a contest with the representatives of his deceased partner, by showing that he has, of his own means, paid out as much as the assets were worth, or that he has added by new purchases to the stock on hand, and in this way reimbursed the estate for what he has used in paying the persons from whom these purchases were made.

He cannot compel the plaintiffs to enter upon an account with him as to these matters, for they can only be considered in a contest with the deceased partner's estate.

IX.

The 5th and 9th requests of defendant are fully embraced in the 7th instruction given.

No error can be predicated of the refusal of the 6th and 11th requests, because the court by its 9th instruction,

limited the jury to determining whether by the terms of the sale to McGinty, the defendant was to become a partner, thus putting the facts to them in the most liberal way for him.

The 7th and 10th requests of defendant are covered by the 8th instruction.

The 12th request is covered by the 10th instruction.

It thus appears that the law of the case was fully and fairly expounded.

It is respectfully submitted that the judgment should be affirmed.

Jeff Chandler
Atty for Defts in Error